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LAWS OF MARITIME WARFARE

AFFECTING

RIGHTS AND DUTIES OF BELLIGERENTS

As Existing on August 1, 1914

Prepared by

HAROLD H. MARTIN and JOSEPH R. BAKER

MAY, 1918

WASHINGTON
GOVERNMENT PRINTING OFFICE
1918

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ABBREVIATIONS.

Acts and documents	Hague. International peace conference. 2nd. 1907. Actes et documents . . . La Haye, M. Nijhoff, 1908–9. 3 vols.
Amer. Journal International Law	American journal of international law. v. 1–11. 1907–1917. N. Y., Oxford university press. [Supplement. v.–1–11, 1907–1917, special numbers, 1915, 1916].
Austro-Hungarian Manual	Anhang zum Dienstreglement für die k. u. k. Kriegemarine (Internationales Secund Landkriegsrecht), Vienna, 1913.
Black	Reports of cases argued and determined in the Supreme Court of the United States, December term, 1861, to December term, 1862. 2 v. (included in U. S. Reports as vols. 66 and 67).
British State Papers	Gt. Brit. *Foreign Office.* British and foreign state papers, London, 1841–
C. Rob	Reports in the High Court of Admiralty (England, 1798–1809), 6 vols. [English Admiralty Reports, vols. 1–3.]
Cranch	U. S. Supreme Court Reports, 5–13. U. S., 1801–1815.
Ct. Cl	Cases decided in the Court of Claims of the United States.
Dall	Reports of cases in the courts of the United States [1790–1800] and Pennsylvania [1754–1806].
Fed. Cases	Federal Cases. Comprising cases argued and determined in the circuit and district courts of the United States. 1894–
For. Relations	Foreign Relations of the United States.
French Naval Instructions	Instructions sur l' application du droit international en cas du guerre. Dec. 19, 1913. In U. S. Naval War College, international law topics, 1913.
Gallison	Reports, Circuit Court United States, First Circuit, 1812–1815, Boston, 1845, 2 vols.
Geneva Convention, 1868	International Red Cross convention, concluded at Geneva, October 20, 1868. Treaties, etc., of U. S., p. 1907.
Geneva Convention, 1906	International Red Cross convention, concluded at Geneva, July 6, 1906. Treaties, etc., of U. S., p. 2183.
German Prize Rules	Prisenordnung Sept. 30, 1909. (Reichsgesetzblatt, Aug. 3, 1914.)
Hall	W. E. Hall: A treatise on international law. Fourth edition. Oxford, 1895.
Halleck	H. W. Halleck: International law. San Francisco, 1861.
Higgins	Higgins, Alexander Pearce: Hague peace conference and other international conferences concerning the laws and usages of war; texts of conventions, with commentaries. N. Y., Putnam, 1909.

Holland, Studies in International Law.	Holland, Thomas Erskine: Studies in international law. Oxford, Clarendon press, 1898. 314 p.
Holland	Manual of Naval Prize Law.
Institute	Resolutions of the Institute of International Law. Collected and translated by the Carnegie Endowment for International Peace (Oxford University Press, 1916).
Japanese Regulations	Japanese Prize Court Regulations, 1904. (Russian and Japanese Prize Cases, vol. 2, p. 416.)
Kent	James Kent: Commentaries on American law. Twelfth edition., edited by O. W. Holmes, jr., Boston, 1873.
Lawrence	T. J. Lawrence: The principles of international law. Fifth edition. Boston, 1913.
Lawrence, War and Neutrality in the Far East.	Lawrence, Thomas Joseph: War and neutrality in the Far East. London, New York, etc., Macmillan, 1904.
Moore's Digest	A Digest of International Law, by J. B. Moore, Washington, 1906.
Moore's International Arbitrations	History and Digest of the International Arbitrations to which the United States has been a party. Washington, 1898. 6 vols.
Moore, P. C	Moore, Edmund F.: Reports of cases argued and determined before the judicial committee and the Lords of the Privy Council during the session 1836–1837. (Privy council books 1–9.) 9 v. (included in English Reports as vols. 12–17).
Op. Atty. Gen	Official Opinions of the Attorney General of the United States, 1789. 1852.
Oppenheim	L. Oppenheim: International Law. Vol. II. War and neutrality. Second edition. London, 1912.
Peters	Cases in the Supreme Court of the United States, 1828–1842. 16 vols.
Reports to The Hague Conferences	. . . Reports to the Hague conferences of 1899 and 1907 . . . Oxford, Clarendon press, 1917. At head of title: Carnegie endowment for international peace.
Roscoe, H	Reports of cases argued and determined in courts of exchequer . . . by Crompton, Meeson, and Roscoe . . . London, 1835–1835. 2 v. (included in English reports as vols. 149–150.)
Russ-Jap prize cases	Russian and Japanese Prize Cases. Edited by C. J. B. Hurst, 2 vols. London, 1912.
Russian Instructions	Procedure in Stopping, Examining, etc., Sept. 20, 1900 (Br. & For. State Papers, vol. 24, pp. 882–893.
Russian Regulations	Regulations as to Naval Prizes, 1895 (Russian and Japanese Prize Cases. vol. 1, p. 311).
Russian Rules	Rules concerning contraband (Great Brit. Correspondence respecting contraband in war. Cd. 2348).
Scott	Scott, James Brown. Cases on international law . . . St. Paul, West pub. co., 1906. 961 p.
Spinks Prize Cases	Prize Cases, Reports of cases in the Admiralty prize court and the court of appeal. London. 1856.

Takahashi	Takahashi, Sakuyei: International law applied to the Russo-Japanese war, with the decisions of the Japanese prize courts. (American edition). New York, Banks law pub. co. 1908. 805 p.
Treaties, etc., of U. S.—Malloy	U. S. Treaties, etc. Treaties, conventions, international acts, protocols, and agreements between the United States of America and other powers. Compiled by William M. Malloy, under resolution of the Senate of January 18, 1909 (Res. No. 22, Sixtieth Congress, second session). Wash., Govt. Printing Office, 1910. 2 v. (61st Cong., 2d session, Senate Doc. 357.)
Turkish Regulations	Provisional Law on prizes, Feb. 3, 1912.
Twiss, Law of Nations	Twiss, *Sir* Travers: Law of nations considered as independent political communities . . . 2d ed. revised. Oxford, Clarendon press, 1875. 2 v.
U. S	U. S. Supreme Court Reports.
United States Naval Code	Law and usages of war at sea, a naval war code prepared by Capt. Charles H. Stockton, Washington, Naval War College, 1904.
Westlake	John Westlake: International Law, part II, War. Second edition. Cambridge, 1913.
Wheat	Cases in the Supreme Court of the United States, 12 vols. Wall., Wallace. Cases in the Supreme Court of the United States, 1863–1874. 23 vols.
Wheaton	Henry Wheaton: Elements of international law. Eighth edition, edited with notes by Richard Henry Dana. Boston, 1866.
Woolsey	Theodore Dwight Woolsey: Introduction to the Study of International Law. Sixth edition. Revised by Theodore Salisbury Woolsey, New York. 1908.

LAWS OF MARITIME WARFARE.

THE AREA AND OBJECTS OF MARITIME WAR.

Art. 1. Rules peculiar to naval warfare are applicable only on the high seas and in the territorial waters of the belligerents, exclusive of those waters which, from the standpoint of navigation, ought not to be considered as maritime.—*Institute (1913), p. 175.*

"ARTICLE 2. *War-ships.* Constituting part of the armed force of a belligerent State and, therefore, subject as such to the laws of naval warfare are:

"1. All ships belonging to the State which, under the direction of a military commander and manned by a military crew, carry legally the ensign and the pendant of the national navy.

"2. Ships converted by the State into war-ships in conformity with Articles 3–6."

Institute (1913), p. 175.

"The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture and destruction of private property is essential to that end, and it is allowed in maritime wars by the law and practice of nations."

Kent, vol. 1, p. 99.

"The purpose of war is the same in the case of warfare on land or on sea—namely, the overpowering of the enemy. But sea warfare serves this purpose by attempting the accomplishment of aims different from those of land warfare. Whereas the aims of land warfare are defeat of the enemy army and occupation of the enemy territory, the aims of sea warfare are: defeat of the enemy navy; annihilation of the enemy merchant fleet; destruction of enemy coast fortifications, and of maritime as well as military establishments on the enemy coast; cutting off intercourse with the enemy coast; prevention of carriage of contraband and of rendering unneutral service to the enemy; all kinds of support to military operations on land, such as protection of a landing of troops on the enemy coasts; and lastly, defense of the home coast and protection to the home merchant fleet. The means by which belligerents in sea warfare endeavor to realize these aims are: attack on and seizure of enemy vessels, violence against enemy individuals, appropriation and destruction of enemy vessels and goods carried by them, requisitions

and contributions, bombardment of the enemy coast, cutting of submarine cables, blockade, espionage, treason, ruses, capture of neutral vessels carrying contraband or rendering unneutral service. * * *

"Whereas the objects against which means of land warfare may be directed are innumerable, the number of the objects against which means of sea warfare are directed is very limited, comprising six objects only. The chief object is enemy vessels, whether public or private; the next, enemy individuals, with distinction between those taking part in fighting and others; the third, enemy goods on enemy vessels; the fourth, the enemy coast; the fifth and sixth, neutral vessels attempting to break blockade, carrying contraband, or rendering unneutral service to the enemy."

Oppenheim, vol. 2, pp. 216–218.

"ART. 1. The general object of war is to procure the complete submission of the enemy at the earliest possible period, with the least expenditure of life and property.

"The special objects of maritime war are: The capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, dry docks and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land, and to protect and defend the national territory, property, and sea-borne commerce."

U. S. Naval Code, 1900.

"ART. 2. The area of maritime warfare comprises the high seas or other waters that are under no jurisdiction, and the territorial waters of belligerents. Neither hostilities nor any belligerent right, such as that of visitation and search, shall be exercised in the territorial waters of neutral States.

"The territorial waters of a State extend seaward to the distance of a marine league from the low-water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries inclosed within headlands; and where the territory by which they are inclosed belongs to two or more States, the marine limits of such States are usually defined by conventional lines."

U. S. Naval Code, 1900.

"1. As soon as you learn of a state of war existing between France and * * *, either by the direct orders that you have received, or through official information from our diplomatic or consular agents, or through any other indirect but certain information, you are required, subject to the special interests of the mission entrusted to you, to attack all warships of * * *, to destroy them or to take possession of them by force of arms."

French Naval Regulations, 1912.

The contracting parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes [about 14 ounces avoirdupois], which is either explosive or charged with fulminating or inflammable substances.—*Declaration of St. Petersburg, 1868.*

The contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." [1]

Hague XIV, 1907.

"ARTICLE 14. *Principle.* The right of belligerents to adopt means of injuring the enemy is not unlimited."

Institute (1913), p. 177.

"ARTICLE 16. In addition to the prohibitions which shall be established by special conventions, it is forbidden:

"1. To employ poison or poisoned weapons, or projectiles the sole object of which is the diffusion if asphyxiating or deleterious gases;

"2. To employ arms, projectiles, or materials calculated to cause unnecessary suffering. Entering especially into this category are explosive projectiles or those charged with fulminating or inflammable materials, less than 400 grams in weight, and bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not cover the core entirely or is pierced with incisions."

Institute (1913), p. 177.

"1. Aerial war is allowed, but on the condition that it does not present for the persons or property of the peaceable population greater dangers than land or sea warfare."

Institute (1911), p. 171.

"Nations seem to concur in denouncing the use of poisoned weapons * * *. As to the nature of weapons not poisoned, there is, and perhaps can be, no rule. Concealed modes of extensive destruction are allowed, as torpedoes to blow up ships, * * * mines; nor is the destructiveness of a weapon any objection to its use. Hot shot is permitted, and bombshells, to set fire to a vessel * * *; but it is not thought justifiable to use chemical compounds which may maim or torture the enemy. It seems to be thought that a steam-vessel, on the defensive, may throw her steam or boiling water upon boarders."

Wheaton, Dana's note 166, p. 428.

[1] This is merely an extension of the similar provision found in the Hague IV of 1899.

"The *Tourterelle* French ship in an action with the *Lively* used red-hot shot. The employment of hot shot is not usually deemed honourable warfare; but the blame, if any, rested with those who had equipped the ship for sea. (James, Nav. Hist., vol. 1, 283.) Among the langridge which the American privateer, the *General Armstrong*, used in 1814, against the boats of the British ships *Plantagenet* and *Rota*, were nails, brass buttons, knife-blades, etc.; and the consequence was that the wounded suffered excruciating pain before they were cured. (Ibid., vol. VI, 350.)"

Halleck, Baker's 4th ed., vol. 1, p. 618, note.

"At one period * * * it was considered contrary to the rules of military honor and etiquette to make use of unusual implements of war. Thus the French Vice Admiral, Marshal Conflans, issued an order of the day, on November 8, 1759, forbidding the use of hollow shot against the enemy, on the ground that it was not generally employed by polite nations, and that the French ought to fight according to the rules of honor. The same view was taken of the use of hot shot, grape, chain shot, split balls, etc."

Halleck, Baker's 4th ed., vol. 1, p. 618.

"The amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate. Thus no objection has ever been made to mines; it is not thought improper to ram a vessel so as to sink her with all on board; and torpedoes have been received without protest among the modern engines of war."

Hall., p. 552.

"Klüber (§ 244) pretends that the use of chain-shot is forbidden. Heffter (§ 124) and Bluntschli (§ 560) transform into a prohibition of red-hot shot the remarks of Klüber and De Martens (§ 273 note) that its use has been renounced by agreement in several naval wars, and that doubts have been expressed as to whether it can be legitimately employed."

Hall., p. 552, note.

"SEC. 15.—Prohibition of the Use of Certain Fighting Agencies in Maritime Warfare.

"71. It is forbidden:

1.—Projectiles weighing less than 400 grams that are explosive or are filled with explosive or easily inflammable materials;

2.—Shooting contrivances for the sole purpose of spreading asphyxiating or poisonous gases;

3.—Shooting contrivances that easily spread out or flatten in the human body, as for instance, contrivances with a hard envelope which does not entirely cover the core or bears cuts."

Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

TREATMENT OF MERCHANT SHIP IN ENEMY PORT AT OUTBREAK OF WAR, OR WHEN IGNORANT OF OUTBREAK.

When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.—*Article 1, Hague VI, 1907.*

"SECTION 7. If the belligerent State which may order the merchant vessels of the enemy to leave its ports, permits them to discharge the merchandise on board before leaving, and to load with other merchandise, it should fix exactly the period granted to them for this purpose, and should make it known to the public. In this case the belligerent cannot permit the exercise of the right of seizure as prize against these vessels before the expiration of the said period."

Institute (1882), p. 47.

"ARTICLE 40. War-ships which, at the beginning of hostilities or at the time of the declaration of war, shall be in an enemy port, shall not be subject to seizure, during a period to be fixed by the authorities. During this period, they may discharge their cargo and take on another."

Institute (1898), p. 154.

"ARTICLE 41. Merchant ships compelled by *force majeure* to take refuge in an enemy port, may not be captured therein. They shall be required, during their stay, to conform exactly to the stipulations of the local authority, and to put to sea again within the period that shall be indicated to them.

"If a war-ship shall have been thus compelled to seek refuge in an enemy port, it may be courteously received and provided with the means to put to sea again; if not, it shall be regularly captured."

Institute (1898), p. 154.

"ARTICLE 36. *Extenuation of the principle of capture.*—When a public[1] or private vessel belonging to one of the belligerent powers is,

[1] "By *public ships* are meant all ships other than warships which belonging to the State or to individuals, are set apart for public service and are under the orders of an officer duly commissioned by the State." Definition by Institute (1913), p. 175.

at the commencement of hostilities, in an enemy port, it is allowed to depart freely, immediately or after a reasonable number of days of grace, and to proceed, after having been furnished with a passport, to its port of destination, or to any other port indicated.

"The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered an enemy port while still ignorant of hostilities."

Institute (1913), p. 182.

"The Circuit Court of the United States at Boston, decided,[1] as upon a settled rule of the law of nations, that the goods of the enemy found in the country, and all the vessels and cargoes found afloat in our ports, at the commencement of hostilities, were liable to seizure and confiscation; and the exercise of the right rested in the discretion of the sovereign of the nation. When the case was brought up, on appeal, before the Supreme Court of the United States, the broad principle was assumed that war gave to the sovereign full right to take the persons, and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself. Commercial nations have always considerable property in the possession of their neighbors; and, when war breaks out, the question, what shall be done with enemy's property found in the country, is one rather of policy than of law, and is one properly addressed to the consideration of the legislature, and not to the courts of law. The strict right of confiscation of that species of property existed in Congress, and without a legislative act authorizing its confiscation, it could not be judicially condemned; and the act of Congress of 1812, declaring war against Great Britain, was not such an act. Until some statute, directly applying to the subject, be passed, the property would continue under the protection of the law, and might be claimed by the British owner at the restoration of peace.[2]

"Though this decision established the right, contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right to depend upon a special act of Congress.

"The practice, so common in modern Europe, of imposing embargoes at the breaking out of hostilities, has, apparently, the effect of destroying that protection to property, which the rule of faith and justice gives to it, when brought into the country in the course of trade, and in the confidence of peace. Sir William Scott, in the case of the *Boedes Lust*,[3] explains this species of embargo to be an act of a hostile nature, and amounting to an implied declaration of war, though liable to be explained away and annulled, by a subsequent accommodation between the nations. The seizure is an act at first equivocal, as to the effect, though hostile in the mere execution, and if the matter in dispute terminates in reconciliation, the seizure becomes a mere civil embargo; but if it terminates otherwise, the subsequent hostilities have a retroactive effect, and render the embargo a hostile measure, *ad initio*. The property detained is deemed enemy's

[1] The Cargo of the Ship *Emulous*, 1 Galli., 563, on appeal 8 Cranch, 228.
[2] The *Juanita*, Newberry, 352.
[3] 5 C. Rob., 233.

property, and liable to condemnation. This species of reprisal for some previous injury is laid down in the books as a lawful measure, according to the usage of nations; but it is often reprobated; and it can not well be distinguished from the practice of seizing property found within the terrirtory upon the declaration of war. It does not differ in substance from the conduct of the Syracusans, in the time of Dionysius the elder (and which Mitford considered to be a gross violation of the law of nations), for they voted a declaration of war against Carthage, and immediately seized the effects of Carthaginian traders in their warehouses, and Carthaginian richly laden vessels in their harbor, and sent a herald to Carthage to negotiate. But this act of the Syracusans, near four hundred years before the Christian era, was no more than what is the ordinary practice in England, according to the observation of Lord Mansfield, in Lindo *v.* Rodney.[1] 'Upon the declaration of war, or hostilities, all the ships of the enemy,' he says, 'are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made.' * * *

"There is a marked difference in the right of war, carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end, and it is allowed in maritime wars by the law and practice of nations. * * *

"But it may be doubted in view of the practice of the United States and other nations in cases where expediency has dictated the taking of private property on land, whether the immunity of such property in general is so firmly established, that an argument can be drawn from it in favor of extending the exemption to private property at sea. The objections to the latter principle are forcibly stated by Professor J. N. Pomeroy, in the North American Review, CXIV. 376. for April, 1872."

Kent, vol. 1, pp. 68–100.

"The supreme court of the United States has decided[2] that we have a right to seize and confiscate all goods of the enemy found in the country, and all vessels and cargoes found afloat in our ports, at the commencement of hostilities; but that this right was vested in congress, and, until some statute, directly applying to the subject, be passed, the courts could not condemn such property; that it would continue under the protection of the law, and might be claimed by the owner on the restoration of peace. We have already stated the ancient law of England which prescribes that, at the commencement of a war, the enemy's merchants, with their goods, were to be treated precisely as the English merchants, with their goods, were treated in the enemy's country. But the modern practice of Great Britain has been far less liberal. 'In the recent maritime wars commenced in that country,' says Wheaton, 'it has been the constant usage to seize and condemn, as droits of admiralty, the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect.' The English text-writers, down to the beginning of the recent war with Russia, con-

[1] Doug., 613. [2] Brown *v.* U. S., 8 Cranch, 123.

tinued to maintain the existence of the right to seize and condemn, not only as a general right of war, but as one which could be exercised by the crown, without any express act of parliament to sanction it."

Halleck, p. 363.

"The ancient law of England seems thus to have surpassed in liberality its modern practice. In the recent maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty the property of the enemy found in its ports at the breaking out of hostilities; and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect. As has been observed by an English writer, commenting on the judgment of Sir W. Scott in the case of the Dutch ships,[1] 'there seems something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied.'"

Wheaton, p. 382.

"It is a settled rule of law, that a vessel in a blockaded port has notice of a blockade as soon as it commences; and no evidence of her ignorance can be received. (Prize Cases, Black, Rep. ii, 677.) At the beginning of the Crimean war, British Orders in Council of March 29th, 1854, allowed Russian vessels in British ports six weeks from the date of the order, for loading and departing. This was extended, by an order of 15th April, so as to permit any Russian vessel that shall have sailed from a Russian port in the Baltic or White Seas before the 15th May, bound to any British port, to pursue her voyage, enter, discharge, and depart. This was held, in the *Franciska* (Moore's Privy Council Cases, x. 58), to include the right to depart from and return to ports under blockade, as well as open ports. The French Ordonnance 15th April, 1854, permitted Russian vessels bound to French ports to leave Russian ports in the Baltic or White Seas before 15th May, to pursue their voyage, and return to any port not blockaded.

"The Russian ukase allowed English and French vessels in Russian ports in the Baltic six weeks, from 25th April, for loading and departing. The French Ordonnance of 26th April allowed to all Russian vessels, loaded in Russian ports on French account, free passage to French ports, and on English account to English ports, to 15th May. It was considered in the *Franciska* (supra), that the allies must have intended to allow their own vessels as large a privilege in sailing from Russian ports as they allowed to enemies, and that the order of the 29th March must be considered as giving as large a right to enter blockaded ports as to depart from them. The allies afterwards allowed Russian vessels, in distant ports of the allies, six weeks after the promulgation of the order at such ports. * * *

"During the American civil war, in the case of the *Hiawatha*, lying at Richmond, Lord Lyons wrote to the Secretary of State; and the Secretary of the Navy replied, that 'fifteen days had been specified as the limit for neutrals to leave the ports, after actual blockade has

[1] The *Santa Cruz*, 1 C. Rob., 64.

commenced, with or without cargo.' (The Prize Cases, Black. Rep. ii, 676.) Judge Betts, of the United States Court for New York, having decided that a vessel leaving a blockaded port cannot take with her cargo shipped after the commencement of the blockade, Mr. Seward communicated that to Lord Lyons, as the rule to be followed. (Mr. Seward to Lord Lyons, 16th October, 1861: Dipl. Corr. 1861, 173.) The result was, that a vessel had fifteen days as her limit for leaving port, and that she could not take in cargo after the blockade began. See also the *Tropic Wind*, decided by Judge Dunlop. Upton on Prize Law, 296."

Wheaton, pp. 683, 684, Dana's note, 235.

Hall, p. 459, cites the following instances where enemy public vessels were allowed to depart. "In 1746 an English man-of-war entering the Havana, and offering to surrender, was given means of repairing damages and was allowed to leave with a passport protecting her as far as the Bermudas; in 1799 a Prussian vessel called the *Diana* which had taken refuge in Dunkirk was restored by the French courts; and a few years afterwards an English frigate in distress off the mouth of the Loire was saved from shipwreck and allowed to leave without being captured. But a French Ordonnance of the year 1800 prescribed a contrary conduct, and in the same year the precedent of the *Diana* was reversed and a vessel which had entered a French port under like circumstances was condemned. Some writers, without asserting that a rule of exemption exists, think that justice, or humanity, or generosity demand that a belligerent shall refuse to profit by the ill-fortune of his enemy. Whether this be so or not,—and in the case of a ship of war at any rate a generosity would seem to be somewhat misplaced which furbishes arms for an adversary, and puts them in his hands, without making any condition as to their use—it is clear that a belligerent lies under no legal obligations in the matter."

"An attempt was made at the [Hague] Conference to render obligatory the modern custom of granting days of grace, within which enemy merchantmen found in port at the opening of hostilities are allowed to depart freely provided that they are not laden with contraband, or engaged in taking to the enemy military or naval officers, or despatches relating to the war. But it was defeated owing to the desire of a group of naval powers, headed by Great Britain, to preserve liberty of action in the face of the increasing employment of merchant vessels under modern conditions of naval warfare in transport services, and the carriage of coal and stores to belligerent fleets. A strict obligation to allow the departure of enemy steamers capable of carrying large bodies of men might inflict irreparable injury on a country liable to be invaded by armies sent across the sea."

Lawrence, p. 457.

"The most liberal indulgences ever granted * * * to an enemy's trade are to be found in the Proclamation of President M'Kinley, issued on April 26, 1898, at the commencement of the late war between the United States and Spain. Spanish merchant vessels in American ports were allowed till May 21 for loading cargoes

and departing, and were not to be captured on their return voyage unless their cargoes included contraband of war, or Spanish military or naval officers, or despatches to or from the Spanish Government. Further, enemy merchantmen who had sailed before April 21, the day on which the war broke out, from any foreign port to any port of the United States, were allowed to enter such port, discharge cargo and depart without molestation, and if met at sea on the return voyage to any port not under blockade were to be exempt from capture by American cruisers. Moreover, these liberal rules received extension from the judiciary. In the case of the *Buena Ventura*[1] it was held by the Supreme Court of the United States that Spanish vessels came within the 'intention' of the President's Proclamation if they had sailed from any American port on or before May 21, even though the departure took place before the war began. Acting on this interpretation, the Court released an enemy vessel which had sailed from Ship Island, Mississippi, on April 19, two days before the commencement of hostilities, and was captured at sea on April 22, a day after the outbreak of the war."

Lawrence, War and Neutrality in the Far East, 2d ed., pp. 49–51.

Referring to the short period of grace, 48 hours, granted to enemy merchant ships by Russia in the Russo-Japanese War, Lawrence says:

"The sea-borne trade of Russia in the Northern Pacific is not large in extent or enormous in value. She can afford to see it suffer with equanimity. Japan, on the other hand, has much to lose. Of late the increase of her mercantile marine has been as remarkable as the growth of her fighting navy. She has taken over a large number of its best vessels to act as transports. It is impossible to exaggerate the value of such service to a state which must attack its foe with armies sent across the seas. Perhaps it was the consciousness of this which caused Russia to cut down her days of grace to a minimum. The incident should be a warning to us of what we may expect if we should be engaged in war with a maritime power. In this matter, when belligerents are bound by no definite rules of universal acceptance, they will naturally consult their own interests, though we may hope that cases will sometimes occur in which other considerations will be present to their minds. A power which sees a chance of striking a severe blow at its enemy's trade by cutting the days of grace down to a minimum, is almost certain to do so, especially if its own sea-borne commerce is so small that little is to be feared from retaliatory measures. But, quite apart from purely mercantile considerations, we must reckon here, as in many other questions, with the changed conditions of modern warfare. If a sea-going fleet is to be effective for long together, it must be followed by a train of colliers, supply-ships, repairing-vessels, and hosts of others, carrying all the numerous requirements of a navy which is a mass of complicated machinery, and is afflicted with an insatiable hunger for coal. If, on a sudden outbreak of war, a belligerent finds his ports full of merchantmen belonging to enemy owners, and well adapted for the purposes I have described, he may capture them all, dispensing with days of grace entirely, and taking full advantage of the opportunity which fortune has placed in his hands. In such a case it would be curious to see whether the desire to injure the enemy would prevail over the fear of offending neu-

[1] 175 U. S., 384.

trals, by causing a great dislocation of trade in which some of them are sure to be interested. Certainly it will be wise for British shipowners to read the signs of the times, and not calculate upon a continuance in future of the indulgences which have been accorded in recent years on the outbreak of hostilities to the merchantmen of the belligerent states. There is one class of vessel against which the full rights of war will almost certainly be exercised. I refer to swift liners, built on designs which make them easily adaptable for warlike purposes, and liable to be taken over by their governments in the event of hostilities. It would be criminal folly for a state to permit the departure of any such ships of enemy nationality which happened to be in its ports at the outbreak of a great war."

Lawrence, War and Neutrality in the Far East, 2d ed., pp. 53–55.

"In former times International Law empowered States at the outbreak of war to lay an embargo upon all enemy merchantmen in their harbours in order to confiscate them." However, as regards such vessels, "it became, from the outbreak of the Crimean War in 1854, a usage, if not a custom, that no embargo could be laid on them for the purpose of confiscating them, and that a reasonable time must be granted them to depart unmolested." The question of the liability to capture of enemy merchant vessels at the outbreak of war, either while at sea or in harbor, was taken up at the Second Peace Conference in 1907. "In coming to an agreement on the subject, two facts had to be taken into consideration. There is, firstly, the fact that in all maritime countries numerous merchantmen are now built from special designs in order that they may quickly, at the outbreak of or during war, be converted into cruisers; it would therefore be folly on the part of a belligerent to grant any lenient treatment to such vessels. There is, secondly, the fact, that a belligerent fleet cannot nowadays remain effective for long without being accompanied by a train of colliers, transport vessels, and repairing vessels; it is, therefore, of the greatest importance for a belligerent to have as many merchantmen as possible at his disposal for the purpose of making use of them for such assistance to the fleet. For this reason, Convention VI. represents a compromise, and it distinguishes between vessels in the harbours of the belligerents and vessels on the sea."

Oppenheim, pp. 140, 141, vol. 2.

Article I of the 6th Hague Convention merely provides that it is desirable that enemy merchant vessels be allowed to depart. "It is obvious that, since only the desirability of free departure of such vessels is stipulated, a belligerent is not compelled to grant free departure; nevertheless there must be grave reasons for not acting in accordance with what is considered desirable by article 1. And it must be specially observed that a belligerent may make a distinction in the treatment of several enemy vessels in his harbours, and may grant free departure to one or more of them, and refuse it to others, according to his discretion."

Oppenheim, vol. 2, pp. 141–142.

"All ships and cargoes in the harbours of the territory at the outbreak of war, belonging either to the enemy state or to enemy subjects, were seized under the old law for the profit of the state, in

England by the name 'droits of admiralty'; and this claim was enforced by the British government as late as the outbreak of war with Denmark in 1807. Indeed it was not unusual to lay an embargo on ships belonging to subjects of a power with which war was imminent, in order to detain them within reach of seizure. But since the middle of the nineteenth century it has been the constant practice in declarations of war to name a time within which enemy merchant ships then in harbour may load and depart; and it is usual to add that enemy merchant ships which have sailed from a foreign port before the date of the declaration may enter and discharge their cargoes, and then depart with freedom from molestation on their voyage to any port not blockaded. This, combined with the growing tendency of opinion to favour private enemy property even at sea, may be considered to have made it certain that merchant ships and cargoes in harbour at the outbreak of war and not belonging to the enemy state, with the exception of ships of which the construction indicates that they are intended to be converted into ships of war, would not again be confiscated. * * *

"The immunity from confiscation will not prevent an embargo being laid for special military reasons, as in 1870 Prussia detained neutral as well as French ships for a time at Kiel, in order to conceal her operations for blocking the harbour. Ships belonging to the enemy state in the harbours of the territory at the outbreak of war, and all enemy ships, public or private, entering the harbours of the territory during the war without express immunity, remain subject to seizure and appropriation."

Westlake, vol. 2, pp. 42–44.

"The practice of granting days of grace remains * * * as it was before the Conference. The Powers have recognized its *desirability*, but no merchant-ship can demand it, nor will there be a legal ground of complaint if all enemy merchant-ships within a belligerent's ports at the outbreak of war are ordered to leave immediately or after a 'sufficient' period. Whether the expression 'it is desirable' will be considered as equivalent to a command remains to be seen. States will probably act in the future as they have acted in the past. Captain Ottley [British naval delegate] stated that the British Government had every intention of adhering to the practice which it had observed during the past fifty years in granting days of grace, subject always to the reservation that the time allowed should not compromise its national interests. It was doubtless with a similar mental reservation that the other Powers accepted this Article. States will in the future as in the past consult their own interests in this matter, but their interests may not infrequently involve a consideration for the interests of neutrals."

Higgins, pp. 303.

"It may be stated with confidence that the days of grace of one week were sufficient for Russian ships to enjoy the full benefits of exemption, considering the nature of marine traffic, commercial interest between Japan and Russia, as well as the position of the commercial ports in the Far East; consequently the one week's grace was adopted by the experienced experts of the Japanese Navy."

International Law Applied to the Russo-Japanese War, Takahashi, p. 66.

"That the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States."

Act of July 6, 1812 (2 Stat., 778).

At the beginning of the Franco-Prussian War, French merchant vessels were allowed six weeks "to clear out of port, either laden or in ballast."

Lord Loftus to Earl Granville, July 23, 1870. British State Papers, vol. 60, p. 923.

"France gave a like indulgence; and in 1870 German vessels which had begun to lade upon the date of the declaration of war were allowed to enter French ports without limit of time, and to reissue with a safe-conduct to a German port."

Hall, p. 470.

"In 1870 England objected that in according the privilege then given an injustice was done to neutrals, since German ships bound for neutral ports or inversely remained liable to capture for due cause from the day of the commencement of war. Equity appears certainly to demand that if a belligerent for his own convenience spares enemy's ships laden with cargoes destined for him, he should not put neutrals to inconvenience who have not had an opportunity of sending their goods in vessels which are free from liability to capture."

Hall (note), p. 470.

"In 1877 also, Turkish vessels were permitted to remain in Russian ports until they had taken cargo on board and to issue freely afterwards."

Hall, p. 470.

"On the declaration of a war between the Ottoman Porte and Russia, in October, 1853, a notice was issued by the latter government to the effect that, as the Porte had not imposed an embargo on Russian vessels in its ports, etc., the Russian government, on its part, grants liberty to Turkish vessels in its ports to return to their destination till the 10th (22d) of November."

Halleck, p. 364.

At the beginning of the Crimean War, the French declaration of March 27, 1854, provided that:

"ART. I. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports, and remain there for the completion of their cargoes, until the 9th of May, inclusive."

The British order in council of March 29, 1854, provided "* * * that Russian merchant vessels, in any ports or places within Her Majesty's dominions, shall be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant ves-

sels, if met at sea by any of Her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, That nothing herein contained shall extend to or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any dispatch of or to the Russian Government.

"And it is hereby further ordered * * * that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

On April 7, 1854, it was further ordered that Russian merchant vessels then in port be allowed 30 days to load and to depart.

On April 15, 1854, this privilege was extended to Russian merchant vessels that, before May 15, had sailed from a Russian port of the Baltic Sea or the White Sea for a British port.

International Law Discussions, United States Naval War College, 1906, pp. 48, 49.

At the outbreak of the Spanish-American War, the Spanish decree of April 23, 1898, provided that:—

"A term of five days from the date of the publication of the present royal decree in the Madrid Gazette is allowed to all United States ships anchored in Spanish ports, during which they are at liberty to depart."

The proclamation of the President of the United States, dated April 25, 1898, provided that:—

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, That nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

For a judicial consideration of the 4th paragraph of the foregoing proclamation see *The Buena Ventura* (1899), 175 U. S., 384; also *The Pedro* (1899), 175 U. S., 354.

The rules issued by the Spanish Government at the beginning of the Spanish-American War "were embodied in the royal decree of April 23, 1898. This decree allowed only five days from the date of its publication for the departure of American ships from Spanish ports. It did not in terms prohibit the capture of such ships after their departure, nor did it provide for the entrance and discharge of American ships sailing for Spanish ports before the war. * * * As no captures were made by Spain, no opportunity occurred for the judicial construction of the rules which that Government announced for its guidance."

Moore's Int. Law Digest, vol. 7, pp. 454, 455.

At the outbreak of the Russo-Japanese War, 1904–1905, the Russian Government issued the following decree, dated February 14, 1904:—

"II. Japanese trading vessels which were in Russian ports or havens at the time of the declaration of the war are authorized to remain at such ports before putting out to sea with goods which do not constitute articles of contraband during the delay required in proportion to the cargo of the vessel, but which in any case must not exceed forty-eight hours from the time of the publication of the present declaration by the local authorities."

Japan, by ordinance dated February 9, 1914, provided:

"ART. I. Russian merchant ships which happen to be moored in any Japanese port at the time of the issue of the present rules may discharge or load their cargo and leave the country not later than February 16.

"ART. II. Russian merchant ships which left Japan in accordance with the foregoing article and which are provided with a special certificate from the Japanese authorities shall not be captured if they can prove that they are steaming back direct to the nearest Russian port or a leased port, or to their original destination; this measure shall, however, not apply in case such Russian merchant ships have once touched at a Russian port or a leased port.

"ART. III. Russian steamers which may have left for a Japanese port before February 9, may enter our ports, discharge their cargo at once, and leave the country. The Russian steamers coming under the above category shall be treated in accordance with Article II.

"ART. IV. Russian steamers carrying contraband of war of any kind whatever shall be excluded from the above rules."

Moore's Int. Law Digest, vol. 7, p. 459.

"2. The right of capture does not apply to neutral public vessels. Enemy public vessels come without further formality under the laws of war. (See, however, 7.)

"Public vessels are the vessels of war as well as those employed in the service of the state and under state control. Vessels which are otherwise the property of the state will be similarly regarded. * * *"

German Prize Rules, 1909.

"6. Exempt from seizure are:—

* * * * * * *

(e) Enemy merchant vessels which at the beginning of hostilities are making passage from a German or allied port to their destination, or to some other port designated for them and are provided with a pass; unless they have departed from their prescribed route without sufficient justification (Convention VI., Article 1, 2d Hague Conference)."

German Prize Rules, 1909.

"ART. 15. Merchant vessels of the enemy that have sailed from a port within the jurisdiction of the United States, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.

"Merchant vessels of the enemy, in ports within the jurisdiction of the United States at the outbreak of war, shall be allowed thirty days after war has begun to load their cargoes and depart, and shall thereafter be permitted to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy."

U. S. Naval Code, 1900.

"4. As an exception [to the capture of enemy merchant vessels] you will let freely pass enemy merchant vessels carrying a safe-conduct in conformity with the model annexed to the present instructions, stating that they have been permitted freely to leave a French port after the opening of hostilities in order to proceed directly to the port designated for them in the said safe-conduct.

"You will assure yourself that the document presented to you is authentic and that the conditions have been strictly observed, particularly as respects the route taken by the vessel and the composition of its crew or cargo.

"In case of suspicion as to the authenticity of this document or of failure to execute the conditions stipulated, you will capture the vessel."

"8. You will capture *in all cases* all enemy merchant vessels that can not present to you papers entirely regular and intact or which you suspect especially of having falsified either their journal or any other document concerning their route."

French Naval Regulations, 1912.

Article 1 of Hague Convention VI of 1907 substantially appears as Art. 12 of the Austro-Hungarian Rules of Maritime and Land Warfare, May 2, 1913. See note.

NOTE.—Through agreements between the larger interested commercial and maritime States, to which the Austro-Hungarian Monarchy is a part, a large number of questions dealing with the international law of maritime warfare were regulated, and the laws and customs of land warfare established.

"In so far as they are determined in treaties, the provisions of the international rules of warfare are herewith promulgated in order that they may be observed in case of war.

"*In case of necessity, provisions departing from these rules, shall be adopted.*" Introduction to Austro-Hungarian Rules of Maritime and Land Warfare, May 2, 1913.

In the case of the *Boedus Lust* (1803) (5 Rob., 245, Bentwich Leading Cases, p. 151), a Dutch vessel on voyage from Demerara to Batavia, was detained by the English at the Cape of Good Hope and after the declaration of war against Holland in 1803, captured and condemned as good prize. Sir W. Scott in rendering the judgment in the case said:—

"This was the state of the first seizure. It was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo. That would have been the retro-active effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retro-active effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo* and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly the general mass of Dutch property has been condemned on this retro-active effect; and this property stands upon the same footing."

"Of the right of Great Britain to seize vessels and cargoes found in her ports, on the breaking out of war, I do not find any denial in authorities which are entitled to much weight; and I, therefore, consider the rule of the law of nations to be, that every such exercise of authority is lawful, and rests in the sound discretion of the nation."

Brown *v.* U. S., 1814, 8 Cranch. 110, dissenting opinion of Mr. Justice Story, p. 144.

In the case of the *Phoenix* (1854) (Spinks, 1; 2 Roscoe, p. 238) involving the construction of the British Order in Council of March 29, 1854, fixing the period in which enemy merchantmen were permitted to depart from British ports at the time of the Crimean war, Dr. Lushington lays down the general principle governing documents of this character in the following language: "I am perfectly free to confess that I think it quite clear, that whenever the Government of Great Britain or of any other country, by a public document in the nature of an Order in Council, relaxes the severity of belligerent rights, it ought to be taken in favor of the party for whom it was intended, and that a liberal construction should be put upon it. If it were necessary to confirm my opinion by authority, I could resort without difficulty to that of Lord Stowell. However, it is perfectly clear that that is the true principle. When discussion arises with regard to the intention of those from whom the document emanates, we can only look for that intention to the words in which they express it. The principle being to put upon the words the most extensive interpretation which is consistent with them, I take it for granted

there must be words in the document sufficient to justify that interpretation. I am not at liberty to travel out of the document. If the words of the document are capable of two constructions, then I am clearly of opinion that the one most favorable to the belligerent party in whose favor the document is issued ought to be adopted; but the court must bear in mind that its province is not *jus dare* but *jus dicere*, and I must again refer to the principle which I have often enunciated in this court, *verbis plane expressis omino standum est.*"

"*The Argo*, 1 Spinks, 375; Spinks' Prize Cases, 52, so much relied on by counsel, was an entirely different case from that presented by this record. *The Argo* was a vessel belonging to a Russian owner, sailing under Russian colors, and bound on a voyage from Havana to Cork. Her charter party bore date February 7 at Havana, but it was therein stipulated that she should load at Havana or Matanzas, demurrage not to be paid for forty-two running days. She took on sufficient ballast at Havana to keep her safe, and left there in February for Matanzas, where her cargo was begun to be put on board February 28 and was completed on March 30, and she cleared from that port April 2. March 29, 1854, the British Order in Council printed in the margin was issued. Dr. Lushington, adhering to the views he had expressed in *The Phoenix*, *supra*, held that the order did not contemplate that the vessel should be *laden* at the date of sailing and that the voyage was commenced at Havana to end in Great Britain, notwithstanding she took cargo at Matanzas."

The Pedro, 175 U. S., 354, pp. 68, 69.

In the case of the *Johanna Emilie* (1854) (Spinks, p. 14, Bentwich, p. 152), the Court said:—

"With regard to an enemy's property coming to any part of the kingdom, *or being found there*, being seizable, I confess I am astonished that doubt should exist on the subject. I apprehend the law has been this, that it is competent for any persons to take possession of such property, unless it had any protection by license, or by some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it to adjudication."

In the case of the *Pedro* (1899) (175 U. S. 354) an enemy vessel captured the day after the commencement of the Spanish-American War while leaving Havana for another enemy port, it was contended that she should be restored as being within the intent of the Proclamation of April 26, 1898, exempting from capture for a certain period enemy merchantmen in certain circumstances.

The court said:—"The *Pedro* did not come within the fourth article of the proclamation, for she was in Havana, a port of the enemy, on April 21, and not, 'in any port or place within the United States.' She sailed from Havana for Santiago, another port of the enemy, on April 22, was captured that day, and reached Key West on April 23 as a prize of war. The suggestion that she was thus brought within the exemption requires no remark.

"Nor did the fifth article of the proclamation exempt the *Pedro*. That article provided that 'any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter

such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation.'

"The *Pedro* remained in the harbor of Havana from the 17th until the 22d of April. We think it must be assumed that she was advised of the strained relations between the United States and Spain, and the imminency of hostilities. At all events, she did not leave Havana until the day after that designated by Congress and the President as the day on which war actually began, and which was also so regarded by the Government of Spain. She had no cargo to be discharged at any port or place in the United States, but had cargo for Santiago and Cienfuegos, Cuban ports held by the Spanish forces, and she cleared, not for Pensacola, but for Santiago. She was not within the letter of the proclamation, nor within the reasons usually assigned for the exemptions as pointed out in the opinion of the District Judge, 87 Fed. Rep. 927. She had not left a foreign port in ignorance of the perilous condition of affairs, and innocently taking a course which would subject her to our power by entering one of our ports. Neither was she bringing cargo to this country for the increase of our resources, or the convenience of our citizens. On the contrary, she was sailing from one port to another port of the enemy, and all the cargo she had on board was destined for the enemy's ports. Not only this, but she took on cargo at Havana for Santiago, and was captured while thus actually trading from one enemy port, being herself an enemy vessel. In these circumstances the fact that the *Pedro* was under contract to ultimately proceed, after concluding her visits to the Spanish ports, to a port of the United States, to there load for Europe, did not bring her within the exemption of the proclamation."

In the case of the *Buena Ventura* (1899) (175 U. S. 384,) the Supreme Court of the United States held that the Proclamation of April 26, 1898, allowing enemy merchant vessels in the United States until May 21, 1898, to lade and depart, exempted from condemnation an enemy merchant vessel that had sailed from a port of the United States two days prior to commencement of war and bound for a foreign port with liberty to call at another port of the United States to lade bunker coal. Mr. Justice Peckham, who rendered the decision of the court, said:

"It is true the proclamation did not in so many words provide that vessels which had loaded in a port of the United States and sailed therefrom before the commencement of the war should be entitled to continue their voyage, but we think that those vessels are clearly within the intention of the proclamation under the liberal construction we are bound to give to that document.

"An intention to include vessels of this class in the exemption from capture seems to us a necessary consequence of the language used in the proclamation when interpreted according to the known views of this Government on the subject and which it is to be presumed were the views of the Executive. * * * The language of the proclamation certainly does not preclude the exemption of this vessel, and it is not an unnatural or forced construction of the fourth clause to say that it includes this case."

The court distinguished the English case of the *Phoenix*, Spinks, 1, arising under the exemption provision of the English Order in

Council exempting enemy vessels from seizure under certain circumstances, at the beginning of the Crimean war.

In the case of the *Ekaterinoslav*, (1905) (Rus.-Jap. P. C., vol. 2, p. 1), that was a Russian merchant vessel, owned by the Volunteer Fleet Company of Russia, on her way from Vladivostock to Odessa, having left her port before the war and was captured by the Japanese fleet in Corean waters before the formal declaration of war. The Higher Prize Court of Japan held that:—

"As to the Imperial Ordinance No. 20, it grants special immunities to enemy vessels only under certain circumstances, and its application cannot be extended beyond the scope prescribed. The ship under consideration was captured in the Corean seas on her way from Vladivostock to Odessa, and therefore is not entitled to the benefit of the Ordinance. The liability of enemy vessels to capture, whether aware of the opening of hostilities or not, is a generally accepted principle of International law, so that the ignorance of this ship of the outbreak of hostilities between Japan and Russia is no reason for exempting her from capture."

It does not appear that the point was raised in this case that the *Ekaterinoslav* was a part of the Russian Volunteer Fleet. This in itself would make her liable to capture under Article 5 thereof, also under the decision of the United States Supreme Court in the case of the *Panama*, 176 U. S. 535. The Russian Volunteer Fleet is composed of privately owned vessels that are to be taken over by the Government in time of war. The owners receive an annual subsidy, the ships carry government stores between European, Russian and the Pacific coast of Siberia; and the government commissions the officers of the vessels.

Lawrence, pp. 524, 525.

The *Mukden* (1905) (Rus.-Jap. P. C., vol. 2, p. 12), was a Russian merchant vessel owned by the Chinese Eastern Railway Company, a state institution. She left a Japanese port on February 5, 1904, for Vladivostock intending to call at Fusan and was captured at Fusan on February 6, 1904, condemned and held a good prize. Exemption was claimed for her on the ground that she was excepted under the Imperial Ordinance of February 9, 1904. The Japanese Higher Prize Court in upholding the condemnation said that:—

"In paragraph 8 of the appeal, the claimants maintain that the ship ought to be released in accordance with Imperial Ordinance No. 20 of 1904. But the ship does not come under the Ordinance, since she left Nagasaki on the 5th of February, and was captured when she called at Fusan."

In the case of the *Rossia* (1905) (Rus.-Jap. P. C., vol. 2, p. 39), it was held that an enemy merchant vessel captured after the commencement of the war and prior to issuance of the Ordinance of February 9, 1904, was a good prize as the Ordinance did not in express terms have any retroactive effect.

In the case of the *Lesnik* (1904) (Rus.-Jap. P. C., vol. 2, p. 92), it was held that an enemy deep sea fishing vessel was not a merchantman and therefore did come within the purview of the Ordinance of February 9, 1904, granting certain exemptions to merchant vessels of the enemy. See also to similar effect the *Alexander* (1905) (Rus. Jap. P. C., vol. 2, p. 86).

TREATMENT OF MERCHANT SHIP, UNABLE TO LEAVE ENEMY PORT, BY REASON OF FORCE MAJEURE.

A merchant ship unable, owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.—*Article 2, Hague VI, 1907.*

"ARTICLE 37. The public or private vessel unable, owing to circumstances of *force majeure* to leave the enemy port within the period contemplated in the preceding Article, cannot be captured.

"The belligerent may only detain it without payment of compensation but subject to the obligation of restoring it after the war, or requisition it on payment of compensation."

Institute (1913), p. 182.

"The former usage that enemy merchantmen in the harbours of the belligerents at the outbreak of war may not be confiscated, has been made a *binding rule* by article 2 which enacts that such vessels as were not allowed to leave, or were by *force majeure* prevented from leaving during the term of grace, may not be confiscated, but may only be detained under the obligation that they shall be restored, without indemnity, after the conclusion of peace, or they may be requisitioned on condition of indemnities to be paid to the owners."

Oppenheim, vol. 2, pp. 142.

"The important alteration made in the rules of international law by the Convention [H VI–1907] is the abrogation of the rule of confiscation of enemy merchant-ships found in a belligerent port at the outbreak of war," except as provided by Art. 5, H VI–1907, "but they can be requisitioned and must be paid for. Even if such ships are detained until the end of the war, and not used, immense loss will still be occasioned to their owners. The important qualification of Article 5 will probably considerably limit the application of this Convention."

Higgins, pp. 306.

Article 2 of Hague Convention VI substantially appears as Art. 13 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the case of the *Bobrik* (1904) (Rus.-Jap. P. C., vol. 2, p. 107) an enemy sailing vessel was in a Japanese port at the commencement of the war. She was notified to leave before February 16, 1904.

Preparations were made to comply. On February 12th an embargo was placed on her leaving. This was raised on the 13th. In the meantime preparations for leaving were suspended and upon removal of embargo her agents claimed that preparations for leaving could not be completed by the 16th. She was captured on the 17th and adjudicated good price. An appeal was taken to the Higher Prize Court.

In upholding the decision of the lower court, the higher court said:

"Secondly, although grounds exist for dispute as to the character of the *Bobrik*, yet, even if it be assumed for the moment that she is a merchant vessel to which Imperial Ordinance No. 20 of February 9th, 1904, is applicable, the decision of the Prize Court was not improper. It is beyond argument that if at the commencement of hostilities one of the belligerents fixes a suitable limit of time and orders vessels of the hostile power to leave its ports before the expiration of this period, it is the duty of the parties receiving such an order to make energetic preparations to leave, and not to display the slightest carelessness or neglect. Even though the commanding officer of the *Takao* suddenly laid an embargo on the vessel, there was no reason to stop the preparations, as the embargo might have been cancelled at any time. Moreover, although there was ample time between 9 a. m. on February 13th, when the commanding officer of the *Takao* cancelled the embargo, and the expiration of the time allowed for departure, to complete the necessary preparations and leave, the agents representing the owners of the vessel did not make those preparations. This was negligence on their part, and it was actually in consequence of this that the vessel was unable to leave within the stipulated time, and was therefore captured."

The *Manchuria* (No. 2) (1905) (Rus.-Jap. P. C., vol. 2, p. 100), was the case of an enemy merchantman in a Japanese port undergoing repairs at the outbreak of war and not in condition to be navigated at the expiration of the time allowed enemy vessels to leave port. She was captured and condemned as a good prize. The Higher Prize Court said:

"There is no reason why ships should lose their character as proper objects for capture at sea merely because they are under repair, nor, once it is shown that a vessel is an enemy vessel, does the question as to who is in possession of her in any way affect the validity of the capture. Imperial Ordinance No. 20 is based on a usage which operates by way of exception, as it exempts enemy merchant ships from capture, but it operates for a fixed period only, and makes no distinction during that period between vessels able to put to sea and those unable to do so."

TREATMENT OF ENEMY MERCHANT SHIPS ENCOUNTERED ON THE HIGH SEAS WHILE IGNORANT OF THE OUTBREAK OF WAR AND WHICH LEFT THEIR LAST PORT OF DEPARTURE BEFORE WAR BEGAN.

Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities can not be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such cases provision must be made for the safety of the persons on board as well as the security of the ship's papers.

After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war.—*Article 3, Hague VI, 1907.*

"ARTICLE 38. Enemy vessels, public or private, which left their last port of departure before the commencement of the war and which are encountered on the high seas while still ignorant of the outbreak of hostilities, cannot be captured. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the passengers on board as well as for the security of the ship's papers.

"But, where these vessels shall be encountered at sea before the expiration of a sufficient period to be granted by the belligerent, seizure is not permissible. Vessels thus encountered are free to proceed to their port of destination or to any other port indicated.

"After touching at a port in their own country or at a neutral port, these vessels are subject to capture."

Institute, 1913, p. 182.

"Enemy's vessels which at the outbreak of war are on their voyage to the port of a belligerent from a neutral or hostile country, and even vessels which without having issued from an enemy or other foreign port have commenced lading at that time, are occasionally exempted from capture during a specified period. At the beginning of the Crimean war an Order in Council directed that 'any Russian merchant vessel which prior to the date of this Order shall have sailed from any foreign port bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.'

France gave a like indulgence; and in 1870 German vessels which had begun to lade upon the date of the declaration of war were allowed to enter French ports without limit of time, and to reissue with a safe-conduct to a German port. In 1877 also, Turkish vessels were permitted to remain in Russian ports until they had taken cargo on board and to issue freely afterwards."

Hall, p. 469.

The result of the reservation to this article made by Germany and Russia "is that German and Russian cruisers retain the right to capture enemy merchantmen found on the high seas in a state of ignorance of the existence of war, and German and Russian merchantmen are still liable to the exercise of this right by war-ships of their enemies."

Lawrence, p. 457.

Prior to H. VI, 1907 there was no International rule "which prescribed immunity from confiscation for such enemy merchantmen at sea as did not know of the outbreak of war." Although "several times at the outbreak of war during the nineteenth century belligerents decreed that such enemy merchantmen as were on their voyage to one of the former's ports at the outbreak of war, should not be attacked and seized during the period of their voyage to and from such port. Thus, at the outbreak of the Crimean War, Great Britain and France decreed such immunity for Russian vessels, Germany did the same with regard to French vessels in 1870, Russia with regard to Turkish vessels in 1877, the United States with regard to Spanish vessels in 1898, Russia and Japan with regard to each other's vessels in 1904. But there is no rule of International Law which compels a belligerent to grant such days of grace, and it is probable that in future wars days of grace will not be granted. The reason is that the steamboats of many countries are now built, according to an arrangement with the Government of their home State, from special designs which make them easily convertible into cruisers, and that a belligerent fleet cannot nowadays remain effective for long without being accompanied by a train of transport-vessels, colliers, repairing-vessels, and the like.

"In case, however, merchantmen, other than those constructed on special lines in order to make them easily convertible into cruisers, are, at the outbreak of war, on their voyage to an enemy port and are ignorant of the outbreak of hostilities, article 3 of Convention VI. of the Second Peace Conference must find application. They may not, therefore, be confiscated, but may only be captured on condition that they shall be restored after the conclusion of peace, or that indemnities shall be paid for them if they have been requisitioned or destroyed." * * *

"It is obvious that, in case such vessels are not ignorant of the outbreak of war—having, for instance, received the news by wireless telegraphy—they may not any longer claim the privileges stipulated by article 3. And this article stipulates expressly that after having touched a port of their own or of a neutral country, such vessels are no longer privileged."

Oppenheim, vol. 2, pp. 140, 235. 236, 142.

Except as modified by the provision of Hague VI, 1907, or by special provisions allowed by a Power in declaring war, "enemy ships entering the harbours of a state after the outbreak of war are liable to capture as if they were still at sea. * * * Enemy ships wrecked on the coast have not been placed by international consent under any different rule, and their liability to capture is affirmed by French ordinances and practice,[1] but the Institute of International Law has recommended that an immunity should be granted to vessels of the mercantile marine compelled by an accident of *force majeure* to take refuge in an enemy port. Humanity seems to dictate this, especially when it is considered that a ship which might have found a refuge in an enemy port may otherwise be lost in trying to reach home or a neutral one."

Westlake, vol. 2, p. 162.

"Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

Proclamation of the President, April 20, 1898.

"ART. 15. Merchant vessels of the enemy, which shall have sailed from any foreign port for any port within the jurisdiction of the United States before the declaration of war, shall be permitted to enter and discharge their cargo and thereafter to proceed to any port not blockaded."

United States Naval Code, 1900.

"5. You will let freely pass enemy merchant vessels that have taken on cargo for destinations in France or for French account previous to the declaration of war. You will deliver a safe-conduct to these vessels which may freely proceed to the French port that you designate for them and discharge their cargo there.

"But if the place where you have met the said ships and the route followed by them allow you to conclude that they have manifestly deviated from the route that they ought to follow according to their papers without being compelled thereto by circumstances of navigation, you will capture them."

"7. You will capture all enemy merchant vessels which, in the cases of paragraphs 5 and * * * above, have not strictly observed the orders given and previously written in their journals by the commander or authorized representative of the commander of a French warship."

French Naval Regulations, 1912.

"6. Enemy merchant ships which have left their last port of departure before the announcement of the war and which are met at sea ignorant of hostilities can not be captured. If the success of the operations undertaken requires it the said ships are subject to

[1] Despagnet, sec. 655.

The present Convention does not affect merchant ships whose build shows that they are intended for conversion into warships.—*Article 5, Hague VI, 1907.*

"2. * * * Merchant vessels which have taken part in the hostilities, or are in condition to take such part immediately * * * are also subject to seizure."

Institute (1877), p. 15.

ARTICLE 40. In all cases considered in Articles 36, 37, and 38, public or private ships whose build shows that they are intended for conversion into warships, may be seized or requisitioned upon payment of compensation. These vessels shall be restored after the war.

"Goods found on board these ships shall be dealt with according to the rules in Article 39."

Institute (1913), p. 183.

"Experts are perfectly able to distinguish vessels built primarily for warlike use * * *. But it is otherwise with many vessels primarily fitted for commerce. Perhaps few fast ships are altogether incapable of being so used as to inflict damage upon trade * * *. Mail steamers of large size are fitted by their strength and built to receive, without much special adaptation, one or two guns of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen."

Hall, p. 640.

"9. You will capture *in all cases* enemy merchant vessels whose construction indicates that they are intended to be converted into warships or which are carried on the official lists of their government as intended for conversion into warships."

French Naval Regulations, 1912.

Article 5, Hague Convention VI, 1907, substantially appears as Art. 16 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The case of the *Panama* (1900) (176 U. S., 535), was that of an enemy mail vessel, owned and operated by an enemy corporation, constructed under an agreement with the enemy country in accordance with plans making her capable of being used in naval warfare, which agreement likewise provided that the country in time of need was to take her over for use as a naval vessel. The Supreme Court of the United States held that:

"She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

"The intent of the fourth clause of the President's proclamation (of April 26, 1898) was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts 'Spanish merchant vessels' only; and expressly declares that it shall not apply to 'Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.'

"Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a dispatch, of the enemy, cannot reasonably be construed as including, in the description of 'Spanish merchant vessels' which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country."

In the *Mukden* (1905) (Rus-Jap. P. C., vol. 2, p. 12), the Higher Prize Court of Japan makes a distinction between a privately-owned enemy merchant vessel and one owned by the enemy State, saying in reference to exemptions under the Imperial Ordinance of February 9, 1904, that:

"The Ordinance gives exemption from capture only to peaceful private vessels, and is not applicable to a ship that must be considered as the property of the enemy Government."

See also the *Argun* (Rus.–Jap. P. C., vol. 2, p. 46), holding that merchant vessels owned by enemy State did not come within the benefits of the Ordinance of February 9, 1904. See also the *Kotik* (Rus.–Jap. P. C., vol. 2, p. 95).

Article 33. Principle of capture. Public and private vessels of enemy nationality are subject to capture, and enemy goods on board, public or private, are liable to seizure.—*Institute (1913), p. 181.*

Exception.

"ART. XVII. All other merchandise and things not comprehended in the articles of contraband, expressly enumerated and classified as above, shall be held and considered as free and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded."

Treaty of 1828, United States and Brazil. Treaties, &c., of United States, Malloy, vol. 1, p. 138. (This treaty "only for articles relating to commerce and navigation" was terminated December 12, 1841.)

Exception.

"ART. XVIII. All other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by the citizens of both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded."

Treaty between United States and Bolivia, 1858. Treaties, &c., of United States, Malloy, vol. 1, p. 119.

Exception.

"ART. XII. The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

Treaty between United States and Italy, 1871. Treaties, &c., of United States, Malloy, vol. 1, p. 972.

Contra.

"2. It is desirable that the principle of the inviolability of enemy private property sailing under the enemy flag should be universally accepted in the following terms, taken from the declarations of Prussia Austria and Italy in 1866, and under the reservation hereinafter stated, *sub* 3:

'Merchant vessels and their cargoes cannot be captured unless they carry contraband of war or unless they try to violate an effective and declared blockade.'

"3. It is understood that in accordance with the general principles which should govern naval war as well as land warfare, the preceding provision is not applicable to merchant vessels which, directly or indirectly, take part in or are intended to take part in hostilities."

Institute (1875), p. 14.

Contra.

"1. * * * enemy private property sailing under enemy * * * flag is inviolable."

"2. The following are always subject to seizure: objects intended for war or susceptible of being immediately employed therein. Belligerent governments shall in every war determine in advance what articles they will consider within the above description. Merchant vessels which have taken part in the hostilities, or are in condition to take such part immediately, or which have run a blockade which was declared and was effective, are also subject to seizure."

Institute (1877), p. 15.

Contra.

"ARTICLE 4. Private property is inviolable if both parties so treat it, and except in the cases enumerated in Article 23."

"ARTICLE 23. Seizure of a vessel or cargo, enemy or neutral, can occur only in the following cases:

1. When the result of the visit shows that the papers are not in proper form;

2. In all the cases where the grounds for suspicion mentioned in Article 20 exist;

3. When it is discovered by the visit or search that the vessel which has been stopped is transporting articles for the account of the enemy, or destined to the enemy;

4. When the vessel is taken in the act of violating a blockade;

5. When the vessel participates in the hostilities or is intended to take part therein."

Institute (1882), pp. 46, 50.

Contra.

"ARTICLE 112. The prize courts cannot condemn enemy * * * prizes except on the following grounds:

1. Prohibited transportation in time of war;

2. Violation of blockade;

3. Resistance to stopping, visit and search, or seizure;

4. Participation in the hostilities of the belligerents by private vessels."

Institute (1887), p. 76.

"Article 116. In case where a private vessel participates in the hostilities of belligerents, it is necessary that the participation be proved and recognized as such."

Institute (1887), p. 76.

"Article 118. The vessel shall be condemned with its cargo: * * *

"3. In case of participation in the hostilities of belligerents Article 116)."

Institute (1887), p. 77.

"ARTICLE 34. Capture and seizure are permitted even when the vessels or the goods have fallen into the power of the belligerent because of *force majeure*, through shipwreck or by being compelled to put into port."

Institute (1913), p. 181.

"ARTICLE 50. *Rights of the belligerent in the zone of operations.* When a belligerent has not the right of seizing or of capturing enemy vessels, he may, even on the high seas, forbid them to enter the zone corresponding to the actual sphere of his operations.

"He may also forbid them within this zone to perform certain acts calculated to interfere with his activities, especially certain acts of communication, such, for example, as the use of wireless telegraphy.

"The simple infraction of these prohibitions will entail driving the vessel back, even by force, from the forbidden zone and the sequestration of the apparatus. The vessel, if it be proved that it has communicated with the enemy to furnish him with information concerning the conduct of hostilities, can be considered as having placed itself at the service of the enemy and, consequently, with its apparatus, shall be liable to capture."

Institute (1913), p. 186.

The interdiction of commerce between enemies "flows necessarily from the principle * * * that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other. It would counteract the operations of war, and throw obstacles in the way of the public efforts, and lead to disorder, imbecility, and treason. Trading supposes the existence of civil contracts and relations, and a reference to courts of justice; and it is, therefore, necessarily, contradictory to a state of war. It affords aid to the enemy in an effectual manner, by enabling the merchant of the enemy's country to support their government, and it facilitates the means of conveying intelligence, and carrying on a traitorous correspondence with the enemy. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to force them to peace. It is a well-settled doctrine in the English courts, and with the English jurists, that there cannot exist, at the same time, a war for arms and a peace for commerce. The war puts an end at once to all dealing and all communication with each other, and places every individual of the respective governments, as well as the governments themselves, in a state of hostility. This is equally the doctrine of all the authoritative writers on the law of nations, and of the maritime ordinances of all the great powers of Europe. It is equally the received law of this country, and has so decided frequently by the Congress of the United States during the

Revolutionary war, and again by the Supreme Court of the United States during the course of the last war; and it is difficult to conceive of a point of doctrine more deeply or extensively rooted in the general maritime law of Europe, and in the universal and immemorial usage of the whole community of the civilized world."

Kent, vol. 1, pp. 75–77.

The question of the right to capture enemy property on the seas came before the courts of the United States early in the Civil War, 1861–1865. "The United States cruisers exercised the right of stopping and searching neutral vessels, in the manner usual in international wars. The vessels captured—whether for attempt to break blockade, for carrying contraband of war, or as enemy's property—were taken into port, and submitted to the adjudication of the prize courts, as prizes of war. Congress passed no laws establishing any new principles or rules respecting condemnation; and the prize courts proceeded entirely upon the rules of international war. The first case which raised distinctly the question of the right of the United States to exercise war powers in suppressing this insurrection, was that of the brig *Amy Warwick*, before the United States Court at Boston. This vessel was captured at sea, July 10, 1861, on a passage from Rio Janeiro to Richmond, with a cargo of tobacco. The vessel and cargo belonged to persons permanently residing in Richmond. There was no attempt to break blockade, as the capture was at sea, and the existence of war was not known when the vessel sailed. The only ground for condemnation was 'enemy's property.' An elaborate and thoroughly reasoned opinion was delivered by Judge Sprague, (Sprague's Decisions, ii; and Law Reporter xxiv. 335, 494) in which he decided—(1) That it is competent for a nation to exercise the powers of war on the ocean in putting down an insurrection of its own citizens, which has risen to dimensions requiring the exercise of such powers. (2) That, at the time of this capture (July 10, 1861), the political department of the government had decided that the rebellion had reached to that point; and, by calling the militia into actual service, employing the army and navy, and establishing a blockade in pursuance of the law of nations, had treated the state of things as a war *de facto*. (3) That, in case of civil war, among the belligerent powers to be exercised, may be that of condemnation as 'enemy's property,' in the technical sense of the prize law. (4) That one of the proofs of 'enemy's property' is, that it belongs to persons who are at the time permanent residents in a place or region which is under the actual control of the enemy, and of which he has firm possession. (5) In the present case, Richmond, Va., was unquestionably within the lines of the enemy, and under his actual control and *de facto* jurisdiction, civil and military. (6) That the property of a person so residing is to be treated by the prize courts as 'enemy's property,' and the region in which he resides to be styled 'enemy's territory,' without reference to the political or legal relations of the owner or territory to the general government, or the loyalty or disloyalty of the owner: the prize courts looking only to *the predicament of the property*,—to its belonging to a person who is, by his residence, within the actual control and authority of the enemy; it being immaterial

whether he be a citizen or an alien, and, if a citizen, whether loyal or disloyal, and to what sovereignty the territory in which he resides, and which the enemy is holding, belongs *de jure* in time of peace. * * *.

"About the same time, the question of the validity of the blockade instituted by the President was raised in New York, in the case of *The Hiawatha* [Blatch. 16, 632]. * * *.

"The causes of the *Amy Warwick* and *Hiawatha*, with a few others, being appealed to the Supreme Court, were argued and decided together there, [(1862) 2 Black, 635] * * *, under the title of the 'Prize Causes.' The Supreme Court was divided in opinion on the constitutional question whether a special Act of Congress was necessary to enable the President to exercise the belligerent powers of blockade and capture as enemy's property, in a case of civil war or insurrection; the majority holding that such an Act of Congress was not necessary. On the main question, the court was unanimous. They considered it settled in the practice of nations, and necessary in the nature of things, that a nation should have the right to meet a rebellion by the exercise of those acts of force commonly known and classified as belligerent rights, or war powers; that among them are included blockade and capture of enemy's property at sea; that, if an insurrection or civil war reaches the dimensions requiring their exercise, neutral nations must acquiesce; * * *. As to enemy's property, the court held that the exercise of the right of capture and condemnation, as prize of war, of property of a subject residing in the country, was not inconsistent with the claim of sovereign jurisdiction over him and the territory of his residence. The court said that one of the objects of civil war, as of other wars, was to coerce the enemy by cutting off his resources; that the rules of war placed in that category commercial property found at sea, belonging to any person who was a resident of a place within the actual control and *de facto* jurisdiction of the enemy; that the term 'enemy's territory,' applied to such a place, is a technical term, looking only to the fact at the time, and not to the question of right. 'It has,' said Judge Grier, in delivering the opinion of the court, 'a boundary marked by lines of bayonets, which cannot be crossed but by force.' It is enemy's territory 'because it is claimed and held in possession by an organized, hostile, belligerent power.' It was immaterial, the court considered, whether the owner of the property was a citizen or an alien, and whether loyal or disloyal, and what was the *status* of the territory in question and of its inhabitants, as regards the Constitution and laws of the United States and the asserted Constitution and laws of the rebels. The prize courts looked only to the fact that the region was in the possession and control of a power capable of carrying on hostilities against the United States, and of compelling the government to meet them by the exercise of belligerent rights.

"The previous cases cited in support of the general doctrine were Rose *v.* Himely, Cranch's Rep. IV, 272; Cheriot *v.* Foussat, Binney's Rep. (Penn.) iii. 253; Dobrie *v.* Napier, Scott, iii. 225; Santissima Trinidad, Wheaton's Rep. vii. 306; United States *v.* Palmer, Wheaton's Rep. iii. 635: and the commentators, Wheaton's Intern. Law, 363, 365; Grotius, Prolegom. sec. 25; Burlamaqui, 263; Rutherforth's Inst. ii. 503.

"In accordance with this decision, belligerent rights were exercised by the United States cruisers on the ocean, as in case of a foreign war; and all captures were adjudicated on these principles, in the prize courts."

Wheaton, Dana's note No. 153, pp. 375, 376, 377.

"The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property."

Wheaton, sec. 355, p. 450.

Wheaton "does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text-writers. War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property,—from things almost sacred, to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchan-

dise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

"The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is *prima facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *prima facie* right of capture. To merchandise at sea, these objections apply with so little force that the *prima facie* right of capture remains."

Wheaton, Dana's note No. 171, p. 451.

"Several of the ablest continental writers oppose * * * on principle" the distinction made by Wheaton between the capture of private property of the enemy on land and on sea. "The Abbé Mably advocated an entire freedom of commercial intercourse in war, even between the subjects of the belligerent powers; and Emerigon, yielding to the arguments of the Abbé, expresses an earnest desire that the laws of war may be modified or changed accordingly. Others, again, think that the change should extend only to the adoption of the principle that private property on the high seas should be subject to the same rules in war as private property on land; without any modification of the law of war respecting the commercial intercourse of subjects of the belligerent powers. Napoleon, in his memoirs, dictated at St. Helena, says: 'Il est á desirer qu'un temps vienne, où les mêmes ideés libérales s'entendent sur la guerre de mer, et que les armeés navales de deux puissances puissent se battre sans donner lieu á la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simple matelots du commerce,' etc. The great advantages which England, by means of her naval superiority, has derived from the capture of private property upon the high seas, have tended very much to the maintenance of the rigor of the ancient rule of commercial warfare, while other nations have adopted more liberal principles and views in war upon land,—by which the interests and happiness of the human race have been greatly promoted.* * *

"The government of the United States proposed to add to the first article of the 'declaration concerning maritime law,' made by the conference of Paris, April 16th, 1856, the following words: 'and the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.' As already stated, this proposition, although favorably received, has not been adopted

by a majority of the powers represented in that conference, and even if it had been, it would bind only those who adopted it, in their intercourse with each other, and could not affect the general rule of international law on that subject. It may therefore be stated as the existing and established law of nations, that, when two powers are at war, they have a right to make prize of the ships, goods, and effects of each other upon the high seas; and that this right of capture includes not only government property, but also the private property of all citizens and subjects of the belligerent powers, and of their allies. Whatever bears the character of enemy's property (with a few exceptions to be hereafter noticed), if found upon the ocean, or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. * * *

"Notwithstanding the clearness and apparent simplicity of this rule, there is frequently great difficulty in its application to particular cases. Where the question turns solely on the evidence as to the facts of the case, it is attended with no other difficulties than those which usually belong to a judicial investigation of facts; but, in numerous cases where the facts are admitted or clearly proved, questions of much difficulty arise as to their legal import under the laws of war, and the rules by which prize courts are, or ought to be, governed. War establishes very different relations between parties from those which exist in the ordinary transactions of trade and pacific intercourse, and from those new relations arise new duties and new obligations. Hence the rules which govern the decisions of prize courts, under the law of nations, with respect to the ownership of property, widely differ, in many respects, from those which obtain in time of peace in the courts of civil or common law. This renders necessary a special examination of the law of prizes, and the investigation of many nice and refined distinctions in the application of that law.

Halleck, pp. 471–473.

"That the rule of the capture of private property at sea has until lately been universally followed, that it is still adhered to by the great majority of states, that it was recognised as law by all the older writers, and is so recognised by many late writers, is uncontested. A certain amount of practice however exists of recent date in which immunity of private property from capture has been agreed to or affirmed; and a certain number of writers attack warmly, and sometimes intemperately, both the usage of capture itself, and the state which is supposed to be the chief obstacle to its destruction. It becomes therefore necessary to see what value can be attached to the practice in question and to the new doctrines.

"Turning the attention first to practice and to indications of national opinion, the United States is found, under the presidency of Mr. Monroe, proposing to the governments of France, England, and Russia that merchant vessels and their cargoes belonging to subjects of belligerent powers should be exempted from capture by convention. Russia alone accepted the proposal in principle, but refused to act upon it until it had been also accepted by the maritime states in general. Again in 1856, Mr. Marcy, in refusing on the part of the United States to accede to the Declaration of Paris, by which privateering was abolished, stated that as it was a cardinal

principle of national policy that the country should not be burdened with the weight of permanent armaments, the right of employing privateers must be retained unless the safety of the mercantile marine could be legally assured, but he offered to give it up if it were conceded that 'the private property of the subjects of one or other of two belligerent powers should not be subject to capture by the vessels of the other party, except in cases of contraband of war.' That the United States, as might be expected from its situation, has remained willing to consent to the abolition of the right to capture private property at sea, is shown by two more recent facts. In 1870 Mr. Fish expressed his hope to Baron Gerolt that 'the government and people of the United States may soon be gratified by seeing the principle' of the immunity of private property at sea 'universally recognised as another restraining and humanising influence imposed by modern civilisation on the art of war:' and in 1871 a treaty was concluded with Italy by which it is stipulated that private property shall not be seized except for breach of blockade or as contraband of war. Italy had already shown its own disposition in a decisive manner by passing a marine code in 1865, by which the capture of mercantile vessels of a hostile nation by Italian vessels of war is forbidden in all cases in which reciprocity is observed. Austria and Prussia on the outbreak of the war of 1866 declared that enemy ships and cargoes should not be captured so long as the enemy state granted a like indulgence, and hostilities were accordingly carried on both as between those states and as between Austria and Italy without the use of maritime capture. Finally, in 1870 the Prussian government issued an ordonnance exempting French vessels from capture without any mention of reciprocity. In the above facts is comprised the whole of the international practice which can be adduced in favour of the new doctrine. They extend over a short time; they are supplied only by four states; to three out of these four the adoption of the doctrine as a motive of policy was recommended by their maritime weakness. Even therefore if it were not rash to assume that the views of the states in question would remain unchanged with a change in their circumstances, it is plain that up to now not only is there no practice of strength enough to set up a new theory in competition with the old rule of law, but that there are scarcely even the rudiments of such a practice.

"Is there then any sound theoretical reason for abandoning the right to capture private property at sea? Its opponents declare that it is in contradiction to the fundamental principle that war is 'a relation of a state to a state, and not of an individual to an individual,' and that it constitutes the sole important exception to the principle of the immunity of private property from seizure, which is proclaimed to be a corollary of the former principle, and to have been besides adopted into international law by the consent of nations. The value of the first of these two principles, and its claims to form a part of international law, have been already examined in the chapter upon the general principles of the law governing states in the relation of war. It may be judged whether it is true that capture at sea is a solitary exception to the immunity of private property in war by reading the section upon contributions and requisitions in the present chapter, together with the portion of the chapter on military occupation which is there referred to as bearing upon the as-

sertion that contributions and requisitions are not a form of appropriation of private property.

"Finally, is there any moral reason for which maritime states ought to abandon their right of capturing private property at sea? Is the practice harsher in itself than other common practices of war; or, if it be not so, is it harsher in proportion to the amount of the stress which it puts upon an enemy, and so to the amount of advantage which a belligerent reaps from it? The question hardly seems worth answering. It is needless to bring into comparison the measures which a belligerent takes for the maintenance of his control in occupied country, or to look at the effects of a siege, or a bombardment, or any other operation of pure military offence. It is enough to place the incidents of capture at sea side by side with the practice to which it has most analogy, viz. that of levying requisitions. By the latter, which itself is relatively mild, private property is seized under conditions such that hardship to individuals—and the hardship is often of the severest kind—is almost inevitable. In a poor country with difficult communications an army may so eat up the food as to expose the whole population of a large district to privations. The stock of a cloth or leather merchant is seized: if he does receive the bare value of his goods at the end of the war, which is by no means necessarily the case, he gets no compensation for interrupted trade and the temporary loss of his working capital. Or a farmer is taken with his carts and horses for weeks or months and to a distance of a hundred or two hundred miles; if he brings back his horses alive, does the right to ask his own government at some future time for so much daily hire compensate him for a lost crop, or for the damage done to his farm by the cessation of labour upon it? It must be remembered also that requisitions are enforced by strong disciplinary measures, the execution of which may touch the liberty and the lives of the population; and that in practice those receipts which are supposed to deprive requisitioning of the character of appropriation are not seldom forgotten or withheld. Maritime capture on the other hand, in the words of Mr. Dana, 'takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance,' which by modern trading custom is invariably employed to protect the owner of property against maritime war risks, and which effects an immediate distribution of loss over a wide area. Mild however as its operation upon the individual is, maritime capture is often an instrument of war of a much more efficient kind than requisitioning has ever shown itself to be. In deranging the common course of trade, in stopping raw material on its way to be manufactured, in arresting importation of food and exportation of the produce of the country, it presses upon everybody sooner or later and more or less; and in rendering sailors prisoners of war it saps the offensive maritime strength of the weaker belligerent. In face of the results that maritime capture has often produced it is idle to pretend that it is not among the most formidable of belligerent weapons; and in face of obvious facts it is equally idle to deny that there is no weapon the use of which causes so little individual misery.

"Legally and morally only one conclusion is possible; viz. that any state which chooses to adhere to the capture of private property at sea has every right to do so. It is at the same time to be noted that opinion in favour of the contrary principle is sensibly growing in volume and force; and it is especially to be noted that the larger number of well-known living international lawyers, other than English, undoubtedly hold that the principle in question ought to be accepted into international law. It is easy in England to underrate the importance of continental jurists as reflecting, and still more as guiding, the drift of foreign opinion."

Hall, pp. 460–466.

"From time immemorial the practice of capturing private property at sea has been carried on by belligerents. But within the last hundred and fifty years a strong dislike to it has sprung up in America and on the continent of Europe. The United States has favored the policy of exemption from the beginning of its national career. It was embodied in Franklin's treaty with Prussia in 1785, but found no place in subsequent treaties with that power. In 1823 Mr John Quincy Adams, as Secretary of State, proposed to the governments of England, France, and Russia that they should enter into a convention for the purpose of exempting private property at sea from the depredations of war, an exemption which he seems curiously enough to have regarded as equivalent to 'the total abolition of private maritime war.' England and France declined to entertain the proposal, and, as Russia made her acceptance conditional on that of the other naval powers, nothing came of the effort to engraft it on the International Code. In 1856 another attempt was made by the American Government to obtain a general recognition of the principle of exemption. The powers assembled in Congress at Paris had drawn up and signed a Declaration on Maritime Law, the first article of which decreed the abolition of privateering. When this important document was submitted to the United States for signature, President Pierce and his Cabinet declined to give up for their country the right to employ privateers, unless all private property at sea, except contraband of war, was freed from liability to capture. France, Russia, and Prussia, were willing to consent to this enlargement of the scope of the original Declaration; but the project fell through mainly owing to the opposition of Great Britain and a change of President in the United States. In the correspondence of 1861 on the subject of the Declaration, Mr. Seward, then Secretary of State, expressed a wish that it might be accepted; and when, in 1870, the Prussian Government notified that it would not capture private property at sea during the war which had just broken out with France, Mr. Fish, in acknowledging the receipt of the declaration in favor of exemption, gave utterance to the hope that 'the government and people of the United States may soon be gratified by seeing it universally recognized as another restraining and harmonizing influence imposed by modern civilization upon the art of war.' In the following year he was able to do something towards the realization of his own wish by negotiating a treaty with Italy, which provided that in the event of war between the two powers, the private property of the citizens and subjects of each should be exempt from seizure at sea, unless it were contraband of war. The American delegates to the

Hague Conference of 1899 were instructed to bring the matter forward. As it was not included in the official programme, they had some difficulty in doing this; but at last they so far succeeded that the Conference in an official 'wish' referred the proposal to grant immunity to private property in naval warfare to a subsequent Conference for consideration. This was given in 1907, when the second Hague Conference debated the subject with great earnestness and ability. In the end the American proposition failed to obtain the well-nigh general adhesion necessary for its adoption, though it was supported by a majority of the votes actually cast. The only tangible result of the discussion was the embodiment in the Final Act of the Conference of a 'wish' to the effect that 'the powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land.' As private property in land warfare is subject to the right of requisition and other interferences, this 'wish' may be regarded as an expression of a purely platonic affection for the American project.

"The facts just narrated bring two points into prominence. It is quite clear that the United States is in favor of exemption as a fixed and settled policy, but does not regard it as part of the public law of the civilized world. It is something to be desired and worked for, not something that has been already obtained. In Europe the conflict of 1866 between Prussia and Italy on the one side, and Austria on the other, was fought from beginning to end without resort to the capture of private property at sea. And when a new view of international duty has stood the test of a great war, it can no longer be regarded as purely academic in its nature. But the influence of the particular view now under consideration has not been confined to one war in which naval operations played a subordinate part. It made itself felt in Article 211 of the Italian Maritime Code, which forbids Italian ships of war to molest the merchant vessels of any enemy who refrains from capturing the private property of Italian subjects; and its strength was further manifested in the Commercial Treaty of 1871 between the United States and Italy, whereby, as we have already seen, the two countries agreed to grant exemption, on the footing of reciprocal concession. There seemed at one time every prospect of freedom from molestation for peaceful commerce in the great war of 1870–1871 between France and Germany. Prince Bismarck declared at its commencement that private property on the high seas would be exempt from seizure by the ships of the King of Prussia without regard to reciprocity. But in January, 1871, the concession was withdrawn, because France acted upon her full rights as a belligerent, and made prizes of German merchantmen. Consequently this last instance may be quoted for or against the contention that the new ideas are gaining ground. It cannot, however, be denied that they have in some cases influenced practice; and when once the besieging forces of theory have gained a footing within the citadel of action, they have a habit of carrying it entirely after a more or less stubborn conflict with its defenders.

"If we turn from the deeds of rulers and commanders to the opinions of jurists, we shall find a great mass of modern authority in favor of the proposed change. During the eighteenth century the voices raised in its favor were few and far between. Franklin in

America, Mably and Galiani in Europe, were its chief advocates. But now its supporters are numerous and active. Bluntschli, De Martens, Bernard, De Laveleye, Calvo, Hall, Maine, and many others still living, have championed the new view. The Institute of International Law has twice pronounced in its favor, and though there are signs of a reaction in the works of the younger generation of modern publicists, the majority of jurists are probably on its side. Why then, it may be asked, has it not been adopted by the maritime powers, and made into a rule of International Law, with the necessary exceptions and qualifications, which may be found duly set forth in the Maritime Code adopted after long deliberation by the Institute of International Law at its session at Heidelberg in 1887. The answer is that the immunity of private property from capture at sea will not be decreed till the rulers of the great majority of states are convinced that it will not deprive them of any important advantage in warfare which they possess under present conditions. Some are already in this balanced state of mind. Others hold that the change would be positively advantageous, while a powerful minority look on it as hurtful. Opinion is fluid and uncertain, as the proceedings at the Hague Conference of 1907 conclusively showed. No alteration in existing rules was made; but in the discussion on the American proposal Brazil suggested a right to requisition in case of necessity, Belgium the sequestration of enemy ships and cargoes during the war, Holland the exemption from capture of vessels as to which the enemy certified that they would not be put to warlike uses, and France the abolition of prize money and the grant of compensation to private individuals from the state for losses sustained by captures. Even Great Britain, the chief opponent of the change, held out hopes of assent, if the desired immunity were coupled with a general diminution of armaments. All this betrays an uneasy consciousness that the present law requires alteration, coupled with inability to discover the right line of amendment.

"Those who are in favor of the proposed exemption rely largely on humanitarian considerations. They point to the security from indiscriminate pillage now enjoyed by private property in war on land, and denounce as barbarous its continued liability to capture at sea. They also argue that, as enemy goods laden on neutral merchantmen are now protected from capture by the Declaration of Paris of 1856, unless they are contraband in their nature, the further step of allowing them, with the same exception, to go free, along with the vehicle that carries them, even when it flies the enemy's flag, would not deprive belligerents of a right of any great value, while the security it afforded to peaceful trade would be a marked gain to humanity. The defenders of the present practice point out that the analogy of land warfare is deceptive. When an invader occupies a district, he can levy contributions and requisitions on private property, and compel the inhabitants to perform certain services. Thus he not only deprives the enemy state of its resources, but utilizes them for his own purposes But at sea a vessel of the hostile country must either be captured or allowed to go free. It is impossible to seize a fraction of her, and in most cases it would be impossible to transfer in a reasonable time any considerable portion of her cargo. Yet if she is set at liberty, both she and the goods she carries swell the resources of the enemy, and help him to continue his war. Moreover

the capture of a merchantman is as orderly a proceeding as the occupation of a village. There is no more pillage in the first case than there is in the second. If there be any moral difference it is in favor of the naval operation; for women and children are rarely to be found on board a trading vessel, whereas they are always present in the smallest cluster of land habitations. Indeed, it may be contended with justice that there is no more humane method of reducing an enemy's means of carrying on war than the destruction of his sea-borne commerce. It involves little bloodshed. Now that the detention of the crews of captured merchantmen as prisoners of war has been practically abolished, it no longer means deprivation of liberty to peaceful mariners. What is doubtful is not the humanity of the practice, but its effectiveness, as we shall soon show. The argument that the suggested change is but a comparatively trivial development of the concession made when the maxim *free ships, free goods* received general assent is met by traversing the alleged fact. The contrary is declared to be more nearly true. It is asserted that to destroy an enemy's commercial marine is one of the most effective methods, and in the case of a power whose chief weapon is his fleet, the only effective method, of weakening his resources and inducing him to sue for terms.

"The doctrine, borrowed from Rousseau, that war is a relation of state to state, and has no concern with individuals except as agents of the state, has been so often quoted with approval that it is regarded in many quarters as axiomatic. The capture of private property at sea is clearly inconsistent with it, and this alone is deemed sufficient ground for an alteration of practice. But in truth the supposed axiom is a transparent fallacy. Belligerents constantly exercise severities against private individuals belonging to the enemy state, though promiscuous robbery and slaughter is no longer permitted. A simple enumeration of the rights possessed by an invader over the non-combatant inhabitants of the territory under his military occupation is sufficient to make good this assertion. Land warfare, therefore, which is constantly held up as an example by the advocates of change, takes no account of the boasted doctrine. Why then should sea warfare accept it on pain of being denounced as inferior in humanity?

"In fact the controversy is unreal and hopelessly out of date in so far as it depends on purely humanitarian considerations. Armed conflicts cannot be waged without much suffering; but on the whole maritime operations involve less of human misery than those which are conducted on land. The belief that war is an evil in itself, and therefore to be restricted if it cannot be destroyed, is the true moral justification of the attempt to protect sea-borne commerce from its attacks. The idea of any special inhumanity in them may be dismissed as an illusion; but nevertheless to end them by international agreement would be a distinct gain, unless wars were so lengthened thereby that the sum total of loss and suffering was increased rather than diminished. Here lies the real moral problem; and we see at once that it is closely connected with a material problem. If it be true that the capture of private property at sea shortens wars considerably, then it will be wise and right to retain the practice. If, on the other hand, no such effect is produced, but instead unnecessary loss and annoyance is caused to neutrals as well as to enemies, then the right to make such captures should be abolished. There is

much dispute as to both of these questions. In order to discuss them fruitfully, we must take into account the present condition of warfare and commerce and national armaments. All three are constantly changing, and their changes affect the material self-interests of nations. These in their turn affect the minds of rulers, who are not likely to consent to a limitation of belligerent rights from purely altruistic motives.

"We will begin by stating the exact nature of the proposal which is generally, but inadequately, described as the exemption of private property from capture at sea in time of war. Several kinds of private property are already exempt. Neutral goods in neutral vessels and enemy goods in neutral vessels are unconfiscable, unless they are contraband in character. When innocent neutral goods are found in enemy vessels, the vessels are liable to seizure, and must be brought in for adjudication. This involves the bringing in of the cargoes also, but on proof of neutral character they are released. Speaking generally, and leaving out of account special circumstances, the only case in which goods can now be captured at sea is when they are enemy goods laden on board an enemy vessel. What is proposed is to free from liability to seizure both enemy ships and enemy goods found on board such ships, provided always that they are not implicated in a contraband traffic or an attempt to break blockade. If this proposal were carried out, a great concession would be made to belligerent ship-owners and traders, and a smaller one to neutral shippers, who would escape the risk and delay inseparable from a suit before a belligerent prize court. But the concession to enemy interests would not be quite so great as it appears at first sight. Inshore fishing boats and petty local trading craft are already protected from capture, as also are cartel ships, hospital ships—private as well as public—and, with certain limitations, merchantmen found in an adversary's port at the moment of the outbreak of hostilities or met at sea immediately after. We see, therefore, that a considerable portion of the trade carried on by enemy vessels is now free from molestation. Moreover, the freedom which it is proposed to grant to the remainder is limited by the proviso that vessels and cargoes shall still be subject to the law of contraband and blockade, and by the continued application to them of the penalties inflicted on vessels that carry false papers, resist search, or engage in services connected with warlike operations. Whenever the private property of enemy subjects afloat gives direct aid to the enemy government in its war, it will be liable to capture under the proposed new rules, just as it is at present.

"The question at once arises whether indirect aid is important enough to affect the issue of a struggle. And we have to remember that it is only indirect aid given by means of commerce carried on under the belligerent flag which counts in the present connection, for goods arriving or departing in neutral vessels cannot be captured unless they are contraband in character or engaged in an attempt to violate a blockade. Confining our attention, therefore, to what is relevant, we discover that the question whether the capture of private property at sea will cripple an adversary and bring the war to a speedy end is capable of more answers than one. Countries like Norway and Greece, which possess a very large mercantile marine and a weak fighting fleet, would find themselves

ruined in a short time if a great naval power made war on their commerce. Countries like the United States, with a small mercantile marine and a powerful navy, would be able to support a struggle at sea as long as their warships could continue the conflict, without regard to the fate of the few merchantmen that navigate under their flag. These are extreme cases; but the majority of states are in a very different position. They are continental, and a large portion of their external trade comes and goes over their land frontiers. They possess a considerable mercantile marine; but much of what they export and import by way of the ocean reaches and leaves them in foreign vessels. If their adversary in a war swept their commercial flag from the seas, they would doubtless suffer appreciable loss and inconvenience. But, unless they were ringed round by a circle of hostile territories, they would be able to obtain across their land frontiers all that was essential for the continuance of the struggle, though at an increased cost. And unless Great Britain was their opponent they would be able to carry on by the aid of some of her abundant commercial craft most of the trade which could no longer travel in their own vessels. The chances are so enormously against a combination of the two possibilities that it may be left out of consideration. We may safely conclude that what we may call the average state would not under present conditions find herself crippled in a war by the loss of her mercantile marine, nor would she bring an enemy of the same class to his knees by destroying or shutting up in port all his merchant vessels. We come now to states that are very small and weak, and they need not detain us long. It can make little difference to them, if they are seriously attacked, whether the onslaught is directed against their trade or their territory. In no circumstances can they maintain their independence by their own strength. Fortunately for humanity worthier considerations than those of mere force preserve their separate existence.

"We have reserved to the last a consideration of the case of Great Britain, because it is unique. Japan is the only other power that occupies a position of similarity in that it is at once insular, naval, and commercial. But the differences are as great as the resemblances, since Japan is military as well as naval, and does not possess a world-wide empire, nor is its foreign trade essential to the subsistence of its people. To no other state is the security of its sea-borne commerce so overwhelmingly important as it is to Great Britain, and no other state possesses such enormous means of striking at the sea-borne commerce of its foes. The first consideration would incline British statesmen to welcome the proposed immunity, the second makes for its rejection. Let us try to strike the balance between the two, premising that any conclusions we may reach must be cautiously advanced, seeing that political, naval, legal, commercial, and financial experts speak with divers tongues and varying degrees of emphasis.

"It is admitted on all sides that a serious attack on the overseas trade of the British Empire would be exceedingly dangerous, unless it could be repelled before it had time to develop. Twelve million tons of shipping, and goods to the amount of something like two thousand million pounds sterling in a single year, form a big target for the aim of the commerce destroyers of an enemy. And it must be remembered that British ship-owners are cut off from the resource

of transferring their vessels to neutral flags, not only by the practical certainty that such transfers would not be recognized by the enemy, but by the impossibility that neutral traders could find enough capital to purchase, or enough seamen to man, such an enormous mass of shipping. In fact they would be unable in such an emergency either to take over the merchantmen of the British belligerent, or to replace them by merchantmen of their own. And as Great Britain must carry on her trade or perish, it would have to be carried on as before in British bottoms, notwithstanding the risks to which it was exposed. Yet security is the life-blood of commerce, and any losses in one quarter would send up freights and prices all over the Empire, and might easily cause a panic far more disastrous than a bad defeat.

"British naval experts are confident of the ability of the royal navy to ward off these dangers. They point out that the simultaneous reduction in number and increase in tonnage of merchantmen renders the task more easy. Wireless telegraphy, they argue, will send warnings of danger to vessels far away from land, and enable them to summon aid from a large area. As long as command of the sea is retained, food and raw material will reach Great Britain pretty much as usual, and her manufactures will find their way in security to their accustomed markets. As to the danger of panic arising from a few chance captures and a slight rise of prices, some scheme of national indemnity for losses would prevent anything of the kind. The authorities who reason thus generally go on to declare that the British navy could drive from the face of the ocean the mercantile flag of any possible foe, and thus put such financial pressure on him that he would be obliged to give up the contest. Confident of this, they strongly oppose the concession of any further immunity to private property at sea. They are convinced that it would mean the surrender of the one weapon whereby Great Britain could bring to an end a war with a great mercantile power, since she has no army strong enough to invade a powerful country, and strike at its capital after her fleet has defeated its navy and obtained undisputed command of the waters that wash its coasts.

"It is impossible to rely with any degree of certainty on the realization of these sanguine anticipations. Foreign authorities do not seem very sure of the absolute security of British commerce in the stress of a great war. Even friendly critics, whose predilictions are in favor of Great Britain against any country but their own, contemplate as a possibility serious disasters to her mercantile marine. It does not seem reasonable to expect nothing but a course of uninterrupted victories for her navy. And yet a temporary reverse, the loss of the command of an important ocean highway for a few weeks, would work such havoc with her commerce that it might take years to recover itself. Disaster is at least possible, and the possibility is so terrible, involving as it does the prospect of starvation and bankruptcy, that it might be wise to avoid it by consenting to the immunity of private property at sea, even if an effective means of striking at a possible enemy were lost thereby. But, be the weapon of capture ever so effective, it could not be used against a power that had little or no mercantile marine. And is it likely to be as effective as is generally supposed, even when the enemy is largely dependent for his wealth and warlike resources on ocean-borne commerce carried on by his own merchantmen? Unless such an enemy was an insular

power, the destruction of his mercantile marine would mean the transfer of part of his external trade to neutral vessels and a great increase of traffic across his land frontiers. And if the enemy was insular, blockade would be a far more effective weapon than the capture of his trading ships at sea, for it would cripple all trade with him, including that of neutrals. Seeing then that there is doubt as to the safety of British trade in time of war, and doubt as to the possibility of war being quickly ended by the wholesale capture of the enemy's merchant vessels on the part of the British navy, we may conclude that Great Britain would gain more than she would lose by the adoption of the policy of immunity. She would secure for herself what is essential not only to her welfare, but to her existence as a great power, the security of her maritime commerce. And the price paid for so great a boon would be the surrender of a weapon that might easily break in her hand, while she retained in full use a much more potent one.

"If innocent sea-borne commerce were once freed from liability to capture, there would be little likelihood of a return to present conditions. Everywhere commercial interests would be strongly and actively in favor of the new rule. Great Britain, the power that has most to lose by a relapse, need not fear that her enemy in a great maritime struggle would suddenly take to seizing her harmless merchantmen. Reputable powers will not dishonor their signatures to recent international agreements, and all powers, reputable and disreputable alike, will find excellent reasons for keeping the particular agreement in question. No maritime and commercial state would dare to flout the merchants of all nations. Great Britain does about half the carrying trade of the world. Every individual who sends goods to sea under her flag would be directly interested in the safety of her vessels. If this was threatened, neutral governments would be forced by the pressure of public opinion to interfere with pointed remonstrances, and the British navy would be ordered to retaliate by vigorous reprisals. In a very little time the rash and faithless aggressor would find himself compelled to respect the rule he had attempted to violate. The suggestion that the grant of the immunity we advocate would lead to a great stretching of the law of contraband and blockade, in order to make enemy vessels amenable under one head or the other, has been deprived of force by the Declaration of London of 1909. Its provisions bid fair to become the established law of the civilized world; and if this prospect is realized, the present uncertainties will vanish, and a set of clear and consistent rules will be substituted for divergent doctrines and disputed practices.

"Our conclusion then is that on the whole the proposed change would be beneficial. It would certainly decrease the area of destruction, no mean achievement in an age that is about to add warfare in the air to warfare on land and warfare at sea. That it would increase the length of wars, and by so doing add to the loss and misery they inflict, we have seen to be a proposition which will not stand the test of close examination. In the new order of things coasts could still be blockaded, contraband of war captured, and assembling transports seized. And if on the other hand some diminution of naval forces was found to be possible when the duty of protecting ordinary commerce was no longer laid on them, the overburdened nations

would have cause to rejoice. To save from destruction an innocent and useful species of private property, and at the same time to lessen the burden that war fixes on the shoulders of industry, would be a noble task. Let us hope that the next Hague Conference will accomplish it."

Lawrence, pp. 494–508.

"The Declaration of Paris did not touch upon the old rule that private enemy vessels and private enemy goods thereon may be seized and appropriated, and this rule is, therefore, as valid as ever, although there is much agitation for its abolition. In 1785 Prussia and the United States of America had already stipulated by article 23 of their Treaty of Friendship that in case of war between the parties each other's merchantmen shall not be seized and appropriated. Again, in 1871 the United States and Italy, by article 12 of their Treaty of Commerce, stipulated that in case of war between the parties each other's merchantmen, with the exception of those carrying contraband of war or attempting to break a blockade, shall not be seized and appropriated. In 1823 the United States had already made the proposal to Great Britain, France, and Russia for a treaty abrogating the rule that enemy merchantmen and enemy goods thereon may be appropriated; but Russia alone accepted the proposal under the condition that all other naval Powers should consent. Again, in 1856, on the occasion of the Declaration of Paris, the United States endeavoured to obtain the victory of the principle that enemy merchantmen shall not be appropriated, making it a condition of their accession to the Declaration of Paris that this principle should be recognised. But again the attempt failed, owing to the opposition of Great Britain.

"At the outbreak of war in 1866, Prussia and Austria expressly declared that they would not seize and appropriate each other's merchantmen. At the outbreak of the Franco-German War in 1870, Germany declared French merchantmen exempt from capture, but she changed her attitude when France did not act upon the same lines. It should also be mentioned that already in 1865 Italy, by article 211 of her Marine Code, enacted that, in case of war with any other State, enemy merchantmen not carrying contraband of war or breaking a blockade shall not be seized and appropriated, provided reciprocity be granted. And it should further be mentioned that the United States of America made attempts in vain to secure immunity from capture to enemy merchantmen and goods on sea at the First as well as at the Second Hague Peace Conference.

"It cannot be denied that the constant agitation, since the middle of the eighteenth century, in favour of the abolition of the rule that private enemy vessels and goods may be captured on the High Seas, might, during the second half of the nineteenth century, have met with success but for the decided opposition of Great Britain. Public opinion in Great Britain was not, and is not, prepared to consent to the abolition of this rule. And there is no doubt that the abolition of the rule would involve a certain amount of danger to a country like Great Britain whose position and power depend chiefly upon her navy. The possibility of annihilating an enemy's commerce by annihilating his merchant fleet is a powerful weapon in the hands of a

great naval Power. Moreover, if enemy merchantmen are not captured, they can be fitted out as cruisers, or at least be made use of for the transport of troops, munitions, and provisions. Have not several maritime States made arrangements with their steamship companies to secure the building of their Transatlantic liners according to plans which make these merchantmen easily convertible into men-of-war?

"The argument that it is unjust that private enemy citizens should suffer through having their property seized has no weight in face of the probability that fear of the annihilation of its merchant fleet in case of war may well deter a State intending to go to war from doing so. It is a matter for politicians, not for jurists, to decide whether Great Britain must in the interest of self-preservation oppose the abolition of the rule that sea-borne private enemy property may be confiscated.

"However this may be, since the end of the nineteenth century it has not been the attitude of Great Britain alone which stands in the way of the abolition of the rule. Since the growth of navies among continental Powers, these Powers have learnt to appreciate the value of the rule in war, and the outcry against the capture of merchantmen has become less loud. To-day, it may perhaps be said that, even if Great Britain were to propose the abolition of the rule, it is probable that a greater number of the maritime States would refuse to accede. For it should be noted that at the Second Peace Conference, France, Russia, Japan, Spain, Portugal, Mexico, Columbia, and Panama, besides Great Britain, voted against the abolition of the rule. And there is noticeable a slow, but constant, increase in the number of continental publicists who oppose the abolition of the once so much objected to practice of capturing enemy merchantmen."

Oppenheim, vol. 2, pp. 221–224.

"We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea. That result is the only one conformable to principle, for the assimilation of ships to territory is now sufficiently established to make it no longer possible to ignore the fact that the invasion of a neutral ship, which is not reasonably believed to be offending against any law, is the invasion of a field in which innocent neutral authority is exclusive.

"In support of the complete exemption of enemy property, as such, from capture at sea a great mass of public opinion is enrolled, and a certain amount of diplomatic success has been obtained. It was adopted by the treaty of 1785 between the United States and Prussia, and again by that of commerce in 1828 between the same powers, and by the treaty of commerce between the United States and Italy in 1871; and in 1823 Russia was willing to adopt it on the proposition of the United States, but only on the condition that all other naval powers should join in it. Italy adopted it for herself by her Marine Code in 1865, and in the war of 1866 Prussia, Austria and Italy acted on it. In 1870 Prussia proclaimed it at the beginning of the war, but dropped it when she found that France stood by capture; and the United States continue to carry on a diplomatic propaganda in its favour. On principle we must say that the capture at sea of

enemy property as such is a military measure, an operation of war, and that its defence is therefore independent of the mediaeval doctrine of the solidarity of sovereigns and states with their subjects, on which the civil courts maintain the doctrines of Non-Intercourse and even perhaps of Confiscation. Its justification must lie in its effect on the fortunes of a war, the consideration of which must be preceded by that of the legal situation of enemy persons at sea. * * *

"War is not a game or an ordeal, in which two nations meet to determine a difference between them according to certain rules. It is an effort by each of two nations to bend the other to its will, by all the means in its power which do not violate neutral rights and are not ruled out as inhuman. One such means is to isolate its enemy—to cut him off from the comfort and assistance which every group of men derives from intercourse, especially commerce, with their fellow men. Not to mention so obvious an example as blockade, consider what happens when a country is invaded. Does the invader dream of allowing the population of the part which he has not yet occupied to employ the ports which he has occupied, and the routes across the occupied territory leading to those ports, for the purpose of continuing its commerce with third countries, and bringing back the profits of that commerce to strengthen the enemy government which still maintains itself in the unoccupied part? Whatever may be the precise length to which at the Conference of 1907 it was intended to carry the desire (*voeu*) no. 2 expressed by it, common sense assures us that it will not receive so fanciful an interpretation as that. If not, the case of an invader preventing the occupied enemy territory from being made the vehicle for enriching the unoccupied enemy territory, and therefore the enemy government, by commerce, is on all fours with that of captures made by a sea power in order to prevent its enemy from enriching himself by maritime commerce. The latter power has no sovereignty over the sea. True, but neither has an invading power any sovereignty over the occupied territory. Each asserts his physical superiority in a region in which he encounters no neutral right.

"Then, as to the arguments specially addressed to the supposed interest of England, the damage arising from the capture of British shipping has never been so great in proportion to her total shipping as that suffered by her enemies in proportion to theirs—it would probably be less in the altered conditions due to steam navigation—it loses through insurance (and this is an argument applicable to all other countries as well as to England) most of its character as a hardship on individuals, and might be still more equitably apportioned among the people if the state accepted the liability for the losses, as was recommended by the Royal Commission on the Supply of Food and Raw Material in Time of War. There does not then seem any sufficient reason why England should promote the immunity of private property at sea from the burden of military necessity, which lies heavy on private property on land in the shape of requisitions and contributions.

"But the subject must not be dismissed without noticing some of the arguments used by advocates of the change. One is that since enemy property is now not capturable, as such, under the neutral

flag, while even neutral property under a belligerent flag is still liable to the interruption of its transit by the capture of the ship, the present state of the law would cause the carrying trade to be transferred from England, if a belligerent, to neutral nations. It may be answered that for that purpose it would be necessary to transfer the shipping itself, which French prize law does not allow to be done in time of war, while British prize law is that 'the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war.' It would therefore be difficult to find on short notice sufficient capital to pay for a safe and wholesale transfer of British shipping, and the delay and expense caused to freighters by ships being brought in for adjudication on the validity of the transfers of them would seriously diminish the supposed advantage to such freighters of entrusting their goods to alleged neutral bottoms. Another argument is derived from the danger to the supply of food and raw material to the British Isles through the capture at sea of enemy property as such. The answer is that the abolition of that capture would almost certainly lead to our supplies of food and raw material being attacked through a straining of the laws of blockade and contraband, and that whether neutral powers resisted such straining would depend chiefly on their political sympathy. Neutrals, however they may complain of unwarrantable interference with their commerce by belligerents, have seldom interfered on that ground as long as they could persuade themselves that the war would be short. Again, some jurists argue that the capture of enemy ships, so far as based on the desire of preventing them and their *personnel* being used for invasion or for the transport of a force to a seat of war, does not require to be insisted on as a part of the laws of war, because it can always be done when needed for safety by virtue of the necessity which they preach as overriding all laws. My objection to that view of necessity has been stated. If and so long as cases can be foreseen in which the capture and detention in question will be indispensable, the right should in my opinion be preserved as one of the necessities which ought to be provided for in the expression given to the laws of war, and not accepted as an indulgence setting a belligerent free from law. Still another topic urged is that, if enemy ships must be brought in, they ought to be sequestrated and not condemned as prize. If that rule were laid down the situation of private property would be much better at sea than on land, where receipts binding no one to repayment are all that is given for requisitions and contributions. But if the shipowner or cargo-owner, whose trade brings him into contact with the hard facts of war, will not protect himself by insurance, and his own state will not accept any responsibility for his losses, it is ludicrous to expect that the enemy state will show such care for him.

"The Conference of 1907 was of course a field of battle for those who attack the existing system with regard to private enemy property at sea, either radically or only desiring some modification of it, and as being more interesting than any single opinion I will notice the proposals made at the Conference in the order in which they were radical.

"First in that order, as most radical, stands the proposal made by Mr. Choate in the name of the United States, that all private property shall be exempt from capture at sea except under the laws of contraband and blockade, an exception which may here be stated once for all as made, expressly or tacitly, in all the proposals for immunity brought forward at the Conference. This proposal received during the discussion the assent in general terms of the German and Swedish delegates, the former however, the Baron Marschall von Bieberstein, declaring that in the opinion of his government the laws of contraband and blockade ought to be first settled, and the latter, M. Hammarskjöld, admitting that there would be difficulties in the application of the principle. The Danish delegation declared that their government was ready to recognise the principle of the inviolability of private property at sea if it should obtain the approbation of the Conference, but that if the time had not arrived for realising that humane idea by common accord, they would assist in the adoption of measures tending to limit the inconvenience of the existing practice. On the other hand the delegates of Colombia and Argentina maintained the capture of enemy property, as such, as necessary for the defence of powers weaker at sea.

"Next in order come the proposals for a modification of the right of capture made in the names of Belgium and Brazil. The first clause of the Belgian proposal laid down that enemy merchantmen and enemy goods under the enemy flag can be captured and retained by a belligerent only subject to their restitution at the end of the war. Other clauses gave him the right to use the ships and cargoes for military purposes, to sell the ships when their repair or their keep would be out of proportion to their value, and to sell the cargoes if perishable; also he might destroy the ships if the circumstances or the approach of an enemy force prevented his carrying them *intra praesidia*. At the end of hostilities the property remaining in kind, the value of that destroyed, and the sale monies were to be restored to the owners by the captor's state, without any indemnity for deprivation of enjoyment, or for deterioration not caused by grave fault; but that state might shift the burden to the enemy state by the treaty of peace. The crews of the captured ships were to be disembarked as soon as circumstances permitted, and set free on their engagement not to serve against the captor's state during the war, which engagement was to be respected by their own government. The Brazilian proposal empowered a captor to destroy or take an enemy merchantman or all or any part of her cargo, even neutral cargo if the ship is taken, 'when commanded to do so by the most imperious exigencies of war,' on giving to the captain receipts as for requisitions, 'with all possible details for ensuring to the interested parties their right to a just indemnity.' Since the receipts which the Hague laws of land war, even as amended in 1907, require to be given for requisitions neither express nor involve a liability of any one, while it must be very difficult to put any real bounds to a plea of imperious exigency, this proposal, considered with regard to enemy property, was far more favourable to the captor's state than the Belgian one. Considered with regard to neutral cargo, which under it might be requisitioned without destroying the ship, it was contrary to the Declaration of Paris. But in another

respect the Brazilian proposal was very favourable to the captured and their state, since it provided for the crew of the ship destroyed or taken being put on shore in a neighbouring port, 'with the resources necessary for their return to their country,' but did not provide for their not serving against the Captor's state. There was also a proposal made by the Netherlands delegation, to the effect that the captor should set free those enemy merchantmen which he did not desire to use for military purposes, delivering to them a passport in which it should be declared that the enemy is not to use them for such purposes.

"At the opposite extreme to the United States proposal among those submitted was the French one, which was as follows.

"Considering that if the positive law of nations still admits the legitimacy of the right of capture applied to private enemy property at sea, it is eminently desirable that, until an understanding as to its suppression can be arrived at between states, its exercise should be subjected to certain regulations (*modalites*):

"Considering that it is most important that, conformably to the modern conception of war which ought to be directed against states and not against individuals, the right of prize should appear solely as a means of coercion practised by one state against another:

"That in that order of ideas all individual profit to the agents of the state who exercise the right of prize ought to be excluded, and that the losses incurred by individuals through captures ought to fall in the last resort on their state:

"The French delegation has the honour to propose to the fourth committee that it should express the desire (*vocu*) that states which shall exercise the right of capture should suppress the shares of prize money assigned to the crews of the capturing ships, and should take the measures necessary in order that the losses caused by the exercise of the right of capture may not fall entirely on the individuals whose property has been captured. * * *

"The proceedings in committee do not seem to have been carried further with express reference to private enemy property at sea, but the Conference, at a full sitting, unanimously expressed its desire (*voeu*, no. 4) that the preparation of regulations relating to the laws and customs of naval war should figure in the programme of the next Conference, and that in all cases the powers should apply, as far as possible, to war by sea the principles of the Convention relating to the Laws and Customs of War on Land."

Westlake, vol. 2, pp. 145–154.

"Resolved * * *, that it is the sense of the Congress of the United States that it is desirable, in the interests of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."

Joint Resolution of April 28, 1904 (33 Stat., 592).

"ART. 37. The [Enemy] Vessel will be condemned, as also will Enemy cargo. Neutral cargo will be free (except Contraband). The fate of British or Allied cargo will depend upon special circumstances."

Naval Prize Law, Holland.

"ART. 1. The special objects of maritime war are: The capture or destruction of the military and naval forces of the enemy; * * * and of his maritime commerce * * *."

United States Naval War Code, 1900.

"10. Enemy ships, with the exception of those named under 6, are subject to capture. Concerning enemy public vessels, see 2."

German Prize Rules, 1909.

"2. You [officers commanding naval vessels] are likewise required to attack all enemy merchant vessels that you meet and to capture them."

French Naval Regulations, 1912.

Contra.

"French merchant-vessels shall not be subject to be captured or seized as prizes of war by vessels of the Royal Navy of the Confederation. This rule does not of course apply to those vessels which would be subject to capture or seizure if they were neutral vessels."

Decree of July 18, 1870, of King of Prussia, British State Papers, vol. 60, p. 923.

Sir William Scott in the case of the *Hope* (1 Dods., 226) said: "To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories*, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. '*Ei rei non praeponitur;*' and therefore his acts relating to it are not binding."

Quoted in 176 U. S., 568, 575.

In the case of the *Leucade* (1855) (Spink's Prize Cases, p. 217, Bentwich's Leading Cases, p. 157), Dr. Lushington said:—

"We must bear in mind the wide difference between the detention of a vessel under the colours of the enemy or under neutral flags. The destruction of a vessel under hostile colours is a matter of duty; the Court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. Indeed the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor when there is no neutral property on board. * * *"

In the case of the *Hallie Jackson* (1861) (Blatch. 1, 41, 42) that was engaged in trade between Savannah, an enemy port, and Matanzas, a neutral port, "the vessel was despatched under the secession flag. She used that flag on her voyage out, in Matanzas when lying in that port, and on her return voyage, until, apprehending it might be perceived by United States vessels, the master ordered the American flag to be substituted. The master, on the approach to him of the capturing vessel, ordered the mate to conceal the secession flag on board the brig, and it was afterwards found on board the brig and given up to the captors. These facts show not only that the vessel be-

longed to an enemy, but his purpose to navigate her as such, in defiance of the laws and government of the country to which he owed allegiance.

"The doctrine that such use of an enemy's flag is a mark and token of her real ownership is strongly maintained in the English prize court (the *Vrow Elizabeth*, 5 C. Rob., 45:) and Sir William Scott declares it to be the established rule of law that a vessel is clothed with the character of the flag she wears. (Id., note.) This brig, when she sailed from Georgia, and when she was seized, was thus plainly enemy's property, and she was properly captured as prize of war."

In the case of the *Pedro* (1899) (175 U. S. 354) it was argued that the vessel "was not liable to capture and condemnation because British subjects were the legal owners of some and the equitable owners of the rest of the stock of La Compania La Flecha, and because the vessel was insured against risks of war by British underwriters. But the *Pedro* was owned by a corporation incorporated under the laws of Spain; had a Spanish registry; was sailing under a Spanish flag and a Spanish license; and was officered and manned by Spaniards. Nothing is better settled than that she must, under such circumstances, be deemed to be a Spanish ship and to be dealt with accordingly."

Story on Prize Courts (Pratt's Ed.) 60, 66, and cases cited. The *Friendschaft*, 4 Wheat. 105; The Ariadne, 2 Wheat. 143; The *Cheshire*, 3 Wall. 231; Hall Int. Law, 169.

During the Spanish-American War, 1898, an enemy merchant vessel was seized in an enemy port, and used by the United States army. Subsequent to the war the private owner brought suit against the United States to recover damages for such use.

The Supreme Court (1904) (194 U. S., 315) held that such use of the vessel was a rightful exercise of belligerent power, saying that "according to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purpose of gain."

In the case of the *Juliette* (1904) (2 Russ-Jap. Prize Cases, 103) a Russian launch in harbor of Nagasaki, owned by a Russian resident in Nagasaki was captured and held to be good prize. The court said "that the owner of the vessel is a Russian subject, and had a residence in the Japanese Empire for purposes of business. But as he withdrew from the Empire to Dalny in December 1903, foreseeing the outbreak of war between Japan and Russia, he is an enemy person in International Law, and a vessel owned by him is enemy property. As the vessel flew the Russian merchant flag, she is an enemy vessel for this reason also. And as an enemy vessel may be lawfully captured in time of war at any place except within neutral waters, whether such vessel is a harbour or ocean-going vessel, whether she carries contraband of war or not, and whether or not she has been guilty of a hostile act, the capture of the vessel under consideration, after the commencement of war between Japan and Russia, is lawful, and she is liable to condemnation."

The *Bobrik* (1904) (2 Russ-Jap. P. C., 107) was an enemy merchant vessel engaged on a commercial trip at the time of her capture. The lower prize court of Japan held her to be a good prize. An appeal was taken to the higher court on the following grounds; first—"The Prize Court held that, although the inviolability of enemy private property on land is a generally accepted principle of existing International Law, yet it is not adopted as regards enemy property at sea by any universally recognised rule or usage of International Law. But the Italian Maritime Trade Law issued in 1865 provided for the exemption from capture of the merchant vessels of a hostile power in cases where reciprocity was given, and during the war between Prussia, Austria and Italy in 1866 all three nations strictly observed the rule, and not a single merchant vessel was captured. At the beginning of the war of 1870 between France and Prussia, Prussia adopted the principle without any reference to reciprocity, and in 1870 Italy and the United States agreed by a treaty to observe the rule in case of war occurring between them. It appears from these facts that although this rule cannot be said to be yet recognised by all countries, nevertheless it is inaccurate to say that it is not adopted as a usage. Again, it is an accepted principle of International Law that hostile acts should be confined to the belligerent states, and should not be permitted to extend to the injury of private individuals, and the decision of the Prize Court clearly recognises that this rule is at present adopted on land. No logical reason exists why a rule already adopted on land should not be applied to the sea. If a principle be equitable, its recognition by all countries is not essential to its adoption in time of war by one country; it is the natural duty of a civilised country to apply the principle on its own initiative and thus assist its progress towards general recognition. The Japanese Regulations relating to Capture at Sea, relied on in the original decision, are not worthy of the least consideration from the Higher Prize Court, the duty of which is to apply the principles of International Law." * * *

In sustaining the decision of the lower court the Higher Prize Court of Japan said in regard to the first ground for appeal:

"First, the capture by one belligerent of the merchant vessels of the enemy is approved by existing International Law. Not only does no treaty exist between Russia and Japan for mutual abstention from making maritime captures in time of war, but both Empires have prepared Prize Regulations and laid down principles with regard to the capture of merchant vessels and other private property of the enemy at sea. As regards the Italian Maritime Trade Law, the precedents in the war between Prussia, Austria, and Italy, and the treaty between Italy and the United States, quoted by the appellants, it was not intended absolutely to abolish by law or treaty the usage of International Law permitting the capture of enemy property at sea in time of war, and there is no law or treaty which does not demand, as the condition on which a country abstains from attacking enemy private property at sea, that the other party should also abstain, in the event of war between them, from capturing private property at sea. In the case of the Franco-Prussian war indeed, Prussia, at the beginning of the war, without making this condition, declared her intention not to attack French private property at sea;

but as France did not follow her example, but followed the usage of existing International Law Prussia, after a short time, changed her practice, and captured enemy private property at sea. The facts relied on by the appellants, therefore, afford no proof that the principle of the inviolability of the enemy private property at sea is adopted as a usage of existing International Law recognised by all countries. It is the duty of a Prize Court, in deciding the legality of a capture at sea, to follow the rules and usages of International Law, and the laws of its own country. Even if it be in accordance with public rectitude and the duties of man to adopt the rule of the inviolability of enemy private property at sea as well as on land, nevertheless not only has no treaty been made between the belligerents with regard to the application of this principle at sea, nor has it been recognised by the world, but also there are provisions on the subject in the rules and precedents of International Law and the laws of Japan, and it is impossible for, and contrary to the duty of, a Prize Court to follow such principles in deciding as to the legality of a capture at sea. Therefore, the decision of the Yokosuka Prize Court, declaring the capture of the *Bobrik* to be legal, on the ground that the rule as to the inviolability of enemy private property is not held, by the principles and usages of International Law as recognised by all countries, to extend to the sea, and that this view is also adopted in the Imperial Regulations relating to Capture at Sea, was correct."

Trading with the public enemy, unless with the permission of the government, is unlawful.—*Sir William Scott in the "Hoop," 1 C. Rob., 196.*

"One of the immediate and important consequences of the declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. The idea that any commercial intercourse, or pacific dealing, can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license, is utterly inconsistent with the new class of duties growing out of a state of war." * * *

It is "illegal for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests and object and action creates a mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally, engaged in a trade with the common enemy, and thereby affording him aid and comfort whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied contract in every such warlike confederacy, that neither of the belligerents, without the other's consent, shall do any thing to defeat the common object."

Kent, vol. 1, pp. 75, 79, 80.

"One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States at war, without the license of their respective governments. In Sir W. Scott's judgment, in the case of The *Hoop*, this is stated to be a principle of universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. 'There can be no doubt,' says that writer, 'that, from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse, as is often the case, commerce is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently manifest it, for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war, as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the

interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes as to certain merchandises only, while others are prohibited; and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally or specially, it is always, in my opinion, so far a suspension of the laws of war; and in this manner there is partly war and partly peace between the subjects of both countries.'

"It appears from these passages to have been the law of Holland. Valin states it to have been the law of France, whether the trade was attempted to be carried on in national or neutral vessels; and it appears from a case cited (in The *Hoop*) to have been the law of Spain; and it may without rashness be affirmed to be a general principle of law in most of the countries of Europe. * * *"

Sir William Scott in the case of the *Hoop* "notices the constant current of decisions in the British Courts of Prize, where the rule had been rigidly enforced in cases where acts of Parliament had, on different occasions, been made to relax the Navigation Law, and other revenue acts; where the government had authorized, under the sanction of an act of Parliament, a homeward trade from the enemy's possessions, but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; where strong claims, not merely of convenience, but of necessity, excused it on the part of the individual: where cargoes had been laden before the war, but the parties had not used all possible diligence to countermand the voyage, after the first notice of hostilities; and where it had been enforced, not only against British subjects, but also against those of its allies in the war, upon the supposition that the rule was founded upon a universal principle, which States allied in war had a right to notice and apply mutually to each other's subjects.

"Such, according to this eminent civilian, are the general principles of the rule under which the public law of Europe, and the municipal law of its different States, have interdicted all commerce with an enemy. It is thus sanctioned by the double authority of public and of private jurisprudence; and is founded both upon the sound and salutary principle forbidding all intercourse with an enemy, unless by permission of the sovereign or State, and upon the doctrine that he who is *hostis*—who has no *persona standi in judicio*, no means of enforcing contracts,—cannot make contracts, unless by such permission.

"The same principles were applied by the American courts of justice to the intercourse of their citizens with the enemy, on the breaking out of the late war between the United States and Great Britain. A case[1] occurred in which a citizen had purchased a quantity of goods within the British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the place of deposit, and bring away the goods; on her return she was captured, and, with the cargo, condemned as prize

[1] The *Rapid*, 8 Cranch, 155.

of war. It was contended for the claimant that this was not a trading, within the meaning of the cases cited to support the condemnation; that, on the breaking out of war, every citizen had a right, and it was the interest of the community to permit its members, to withdraw property purchased before the war, and lying in the enemy's country. But the Supreme Court determined, that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject.. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the States at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. This liability of the property of a citizen to condemnation, as prize of war, may likewise be accounted for on other considerations. Every thing that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen, or an ally, at the same time that he makes out his interest he confesses the commission of an offence, which, under a well-known rule of the municipal law, deprives him of his right to prosecute his claim. Nor did this doctrine rest upon abstract reasoning only: it was supported by the practice of the most enlightened, perhaps it might be said, of all commercial nations; and it afforded the Court full confidence in their judgment in this case, that they found, upon recurring to the records of the Court of Appeals in Prize Causes, established during the war of the Revolution, that, in various cases, it was reasoned upon as the established law of that Court. Certain it was, that it was the law of England before the American Revolution, and therefore formed a part of the admiralty and maritime jurisdiction conferred upon the United States Courts by their Federal Constitution. Whether the trading, in that case, was such as, in the eye of the prize law, subjects the property to capture and confiscation, depended on the legal force of the term. If *by trading*, in the law of prize, were meant that signification of the term which consists in negotiation or contract, the case would certainly not come under the penalty of the rule. But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse, between individuals of the States at war. Negotiation or contract had, therefore, no necessary connection with the offence. Intercourse, inconsistent with actual hostility, is the offence against which the rule is directed; and by substituting this term for that of *trading with the enemy*, an answer was given to the argument, that this was not a trading within the meaning of the cases cited. Whether, on the breaking

out of war, a citizen has a right to remove to his own country, with his property, or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy's country. As to the claim for the vessel, it was held to be founded upon no pretext whatever; for the undertaking was altogether voluntary and inexcusable.

"So, where hostilities had broken out and the vessel in question,[1] with a full knowledge of the war, and unpressed by any peculiar danger, changed her course and sought an enemy's port, where she traded and took in a cargo, it was determined to be a cause of confiscation. If such an act could be justified, it would be in vain to prohibit trade with an enemy. The subsequent traffic in the enemy's country, by which her return cargo was obtained, connected itself with a voluntary sailing for a hostile port; nor did the circumstance that she was carried by force into one part of the enemy's dominions, when her actual destination was another, break the chain. The conduct of this ship was much less to be defended than that of *The Rapid.*

"So, also, where goods were purchased some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw from the enemy's country his property, purchased before the war, (on which the Court gave no opinion,) such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commencement of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent, the right could not exist.[2]

"In another case,[3] the vessel, owned by citizens of the United States, sailed from thence before the war, with a cargo or freight, on a voyage to Liverpool and the north of Europe, and thence back to the United States. She arrived in Liverpool, there discharged her cargo, and took in another at Hull, and sailed for Petersburg under a British license, granted the 8th of June, 1812, authorizing the export of mahogany to Russia, and the importation of a return cargo to England. On her arrival at St. Petersburg she received news of the war, and sailed to London with a Russian cargo, consigned to British merchants; wintered in Sweden, and, in the spring of 1813, sailed under convoy of a British man-of-war for England, where she arrived and delivered her cargo, and sailed for the United States in ballast, under a Brtish license, and was captured near Boston light-house. The Court stated, in delivering its judgment, that, after the decisions above cited, it was not to be contended that the sailing with a cargo or freight, from Russia to the enemy's country, after a full knowledge of the war, did not amount to such a trading with the enemy as to subject both vessel and cargo to condemnation, as prize of war, had they been captured whilst proceeding on that

[1] The *Alexander,* 8 Cranch, 169. [2] The *St. Lawrence,* 8 Cranch, 434.
[3] The *Joseph,* 8 Cranch, 451.

voyage. The alleged necessity of undertaking that voyage to enable the master, out of the freight, to discharge his expenses at St. Petersburg, countenanced, as the master declared, by the opinion of the United States Minister there, that, by undertaking such a voyage, he would violate no law of his own country; although those considerations, if founded in truth, presented a case of peculiar hardship, yet they afforded no legal excuse which it was competent for the Court to admit as the basis of its decision. The counsel for the claimant seemed to be aware of the insufficiency of this ground, and had applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged in the enemy's country, and having been captured on her return home in ballast. It was not denied that, if she had been taken in the same voyage in which the offence was committed, she would be considered as still *in delicto*, and subject to confiscation; but it was contended that her voyage terminated at the enemy's port, and that she was on her return, on a new voyage. But the Court said, that even admitting that the outward and homeward voyage could be separated, so as to render them two distinct voyages, still, it could not be denied that the *termini* of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage could not be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade. That the going from the neutral to the enemy's country was not undertaken as a new voyage, was admitted by the claimants, who alleged that it was undertaken as subsidiary to the voyage home. It was, in short, a voyage from the neutral country, by the way of the enemy's country; and, consequently, the vessel, during any part of that voyage, if seized for any conduct subjecting her to confiscation as prize of war, was seized *in delicto*."

Wheaton, pp. 392–400.

"In the Crimean war, the rule of non-intercourse with the enemy was greatly relaxed by the belligerents; but it was done by orders and proclamations in advance, professedly relaxing a rule which otherwise the courts of prize would have been obliged to apply. The Order in Council of 15th April, 1854, permitted British subjects to trade freely at Russian ports not blockaded, in neutral vessels, and in articles not contraband, but not in British vessels. (London Gazette, April 18, 1854.) The French orders were to the same effect. The Russian Declaration of 19th April permits French and English goods, the property of French or English citizens, to be imported into Russia in neutral vessels. (London Gazette, May 2, 1854.) The French and Russian Governments allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph. (Courrier des Etats Unis, 23d July, 1855.)

"The subject is not touched by the Declaration of Paris of 1856. The Orders in Council must therefore be considered as a special relaxation, adopted from reasons of policy applicable to that war, and as to which each nation must judge for itself in any future war. In the debates in Parliament, and in speeches made by public men in the commercial cities, as well as in the memorials of merchants, and in contributions to the press, during and soon after the Crimean war, there was a strong disposition evinced to have all trade left free, and

to confine the operation of wars to government property and persons or vessels in public belligerent employment. It was said that the commerce of England was too vast to be protected by her navy, and that she would lose more than she could gain in a contest of captures with any power; and that, if direct trade with enemies was not permitted, the only result would be, that neutrals would carry the cargoes, and the belligerents would not be crippled in commerce or resources, except as to the employment of their own ships and sailors,—a result which would not operate to the advantage of England. The argument on the other hand was, the necessity of requiring each citizen to follow the fortunes of his country in war. In the words of Judge Story, in *The Julia* (Cranch, viii. 181), 'Can an American citizen be permitted in this manner to carve out for himself a neutrality on the ocean when his country is at war? Can an engagement be legal which confirms in him the temptation or necessity of deeming his personal interests at variance with the legitimate objects of his government?' Sir R. Palmer, the Attorney-General, said, 'A political war and a commercial peace are inconsistent;' and he presented cogently the necessity of having it understood beforehand, that each citizen's interest should be involved in the war, and liable to its fortunes, as a means of carrying home a serious sense of responsibility to all classes for engaging in war, as well as a means of making war thorough and decisive, and therefore short and of more rare occurrence.

"The truth is, the most humane and often the most efficient part of war is that which consists in stopping the commerce and cutting off the material resources of the enemy. If cutting off our commerce with him, and his with us, cripples and embarrasses him, it must be done. Driving his general commerce from the sea, and blockading his ports to keep neutral commerce from him, must diminish his resources, and tend to coerce him. It is the least objectionable part of warfare. It takes no lives, sheds no blood, imperils no households; has its field on the ocean, which is a common highway; and deals only with persons and property voluntarily embarked in the chances of war, for the purpose of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill the most men and sink the most vessels, but a grand national appeal to force, to secure an object deemed essential, when every other appeal has failed. The purpose of using force is to coerce your enemy to the act of justice assumed to be necessary. It is hazardous to lay down absolute rules in advance for all nations, under all circumstances, limiting possible means of coercion. Nations should have it in their power to coerce the body politic they are at war with, by a coercion applied to all its citizens in all their interests, and to identify the private interests of each of their own subjects with the national fortunes in the war. It must be assumed that the war is a national act, resorted to from an overpowering necessity for the protection of all; and those responsible for it must remember, that the extremities to which it may reduce a nation, and the means to which it may be necessary to resort, cannot be measured in advance. The controlling motive of every citizen, whether combatant or non-combatant, should be to have the war brought to a close as soon as possible, and to do all that is necessary to that end, con-

sistently with humanity. The policy of exerting this or that legitimate mode of coercion must be left to depend on the circumstances of each case."

Wheaton, Dana's note No. 158, pp. 400–402.

License to Trade With the Enemy.

"It is not unusual * * * for a belligerent to grant to its own subjects a license to carry on a certain specified trade with the enemy, which, if the other party allows it, becomes a safe and legitimate traffic. It is common, also, for the subjects of one belligerent to obtain such a license from the other; but, of course, this of itself will not protect them against the laws of their own country." * * *

Such a license "being an exception to the ordinary rules of war, is to be strictly interpreted, and yet, where there has been evident good faith in following it, slight deviations will not be noticed. If the person, the port or town, the kind and quality of the goods, the limits of time, are prescribed in the license, departures from its terms with the exception of unavoidable delay, will make it void. Thus it has been decided that a license to neutral vessels becomes void when hostile vessels or those of the country giving the license are substituted for them; that a license to import will not cover reexportation; that a license prescribing a certain course of navigation is avoided by voluntary departure from such course; that a license to sail in ballast is forfeited by carrying part of a cargo, or to import certain articles will not protect other articles, not named, although destined for a neutral port, or again to proceed to a certain port is vitiated by calling at an interdicted port for orders. A general license to sail to any port will not include a blockaded one, which is shut by higher laws of war. A license although it has expired will protect in case of unavoidable hindrances. No consul and no admiral, according to English doctrine, can give a license, which is a high act of sovereignty, without authority of the government. A license protects against all cruisers of the enemy, but not against any action of the country to which the licensed person or vessel pertains."

Woolsey, pp. 194, 256.

Property and Persons Comprehended Within the Term "Enemy."

"Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the state to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized.

"Property, not impressed with a belligerent character by its origin, and belonging to a neutral, becomes identified with a belligerent by being subjected wholly to his control, or being incorporated into his commerce. Thus, a vessel owned by a neutral, but manned by a belligerent crew, commanded by a belligerent captain, and employed in the trade of a belligerent state, is deemed to be a vessel of the

country from which she navigates; and the acceptance of a pass or a license from a belligerent state, or the fact of sailing under its flag, entails the same consequences." * * *

"Although the national character of a place and its inhabitants is not altered by military occupation on the part of an enemy, yet for many belligerent purposes they are necessarily treated as hostile by their legitimate sovereign. They are in fact under the control of the enemy, and to treat them as friendly would be to relieve him from the pressure and losses of war. Trade with them, consequently, is subjected to the same restrictions as trade with the enemy and his territory, and property the produce of the country or belonging to persons domiciled there is confiscable under the same conditions as enemy's property. When, for example, the island of Santa Cruz was captured from Denmark by the British, some sugar shipped from there on board an English ship was captured by an American privateer, and was condemned as British property, Chief Justice Marshall saying that 'some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation, although acquisitions made during war are not considered as permanent, until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them.'

"It is to be regretted that this necessary doctrine has been used by the English and American courts to cover acts which it does not justify. It is reasonable that property which has become hostile through the conquest by an enemy of the port at which its owners are domiciled shall be condemned; but if this be done, no good cause can be shown for deciding that hostile property shall not become friendly to a belligerent state from the moment at which the latter obtains possession of the port to which the property belongs. Lord Stowell ruled otherwise. A vessel, owned by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland. The voyage was begun before the conquest of the Cape by the English, but the capture was effected afterwards. Lord Stowell condemned the vessel upon the ground, which would not have been taken up in the inverse case, and which, the change of character being involuntary, was not really in point, that the ship, 'having sailed as a Dutch ship, her character during the voyage could not be changed.' In like manner an English vessel was condemned during the American Civil War by a majority of judges in the Supreme Court, on the ground that 'the occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war.' In both these cases the essential fact was lost sight of that the property of individuals engaged in mercantile acts is confiscated, not because they are personally hostile to the belligerent, but because they are members of the enemy state or closely associated with it, and so contribute to its strength, or else because they are doing acts inconvenient to the belligerent. So soon as they cease, in whatever manner, or from whatever cause, to be members of an

enemy state, or to be associated with it, or so soon as their acts cease to be inconvenient, all reason for the confiscation of their property falls to the ground."

Hall, pp. 523–524, 528–530.

Property Which Has Enemy Character.

"It is an Anglo-American rule that 'the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be'; the consequence being that 'the produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy.' The produce becomes safe from capture when sold to a friend, but is subject to capture as long as it remains the property of the owner of the soil. This is only a particular application of the doctrine which asserts the enemy character of property connected with a house of business in enemy territory, for agriculture is a business, though it is sometimes mentioned as a special rule based on some inherent tie between the soil and its produce. If during the war the other belligerent has occupied the locality in so stable a manner that its own trade with it is free, notwithstanding that there has not been cession or conquest, a third power at war with the occupying belligerent will treat the locality as a possession of its enemy, and apply the rule to justify the capture of its produce while the property of the owner who is politically its friend."

Westlake, vol. 2, pp. 174, 175.

"ART. 38. The Commander should detain any British Vessel which he may meet with trading with the Enemy, unless either:

"(1.) He is satisfied that her Master was pursuing such trade in ignorance that war had broken out,[1] or

"(2.) The vessel is pursuing such trade under a License from the British Government.[2]"

Naval Prize Law, Holland.

"ART. 44. The Commander will be justified in considering a British Vessel as trading with the Enemy—

"1. If she has commenced her voyage from a Hostile port.

"2. If during her voyage she has touched at a Hostile port as a port of call, whether she has actually taken cargo on board thence or not.[3]

"3. If she commenced her voyage, having a Hostile port, either certainly or according to contingencies, for her port of destination or port of call, unless, previous to the time when she is met with, her Master has definitely abandoned the intention to go to a Hostile port.

"4. If her real port of destination is Hostile, though her immediate and apparent port of destination is Neutral.[4]"

Naval Prize Law, Holland.

"[1] *Abby*, 5 C. Rob., 251."
"[2] *Hoop*, 1 C. Rob., 196."
"[3] *Joseph*, 8 Cranch, 545.
"[4] *Jonge Pieter*, 4 C. Rob., 83, which case however turns upon the ultimate destination of the cargo, and the absolute prohibition of communication with the Enemy, 'direct or indirect.' The doctrine of 'continuous voyages' will be more fully discussed hereafter with reference to Neutral ships."

"ART. 45. A port only in the temporary occupation of the Enemy is not to be considered a Hostile port."[1]

Naval Prize Law, Holland.

"ART. 46. Trading, properly so called, is not necessary to constitute the offence, for which mere intercourse is enough. Thus it will in general be no excuse that the Vessel was chartered to bring back to British Territory British property deposited in the Enemy's Territory before the breaking out of the war, if the Charter-party was entered into with knowledge of the war.[2]"

Naval Prize Law, Holland.

"ART. 47. Trading with the Enemy may be lawful when for the benefit of a British Fleet.[3]"

Naval Prize Law, Holland.

"ART. 48. The Vessel will be condemned, as will Enemy cargo. Neutral cargo (except Contraband) will be free. The fate of British or Allied cargo will depend on special circumstances."

Naval Prize Law, Holland.

"ART. 49. Vessels owned by subjects of an Ally of Great Britain in the war are not at liberty, any more than British Vessels, to trade with the Enemy or to act in his service; and, *mutatis mutandis*, the observations in this Chapter relative to British Vessels are applicable to Allied Vessels also.[4]"

Naval Prize Law, Holland.

"24. As the state of war involves the prohibition of all commercial relations between the belligerent nations you should stop French merchant vessels which, unless authorized by a license, try to violate this prohibition or which, with still greater guilt, seek to violate a blockade or engage in the transportation of troops, official dispatches or contraband of war for the account of the enemy or for an enemy destination."

"25. Captains and all persons suspected of complicity should be arrested and sent to the nearest French judicial authority for prosecution if need be under Articles 77 et seq. of the Penal Code.

French Naval Regulations, 1912.

In the case of the *Hoop* (1799) (1 C. Rob. 196, Bentwich Leading Cases, p. 161), a vessel captured while enroute to an English port with a cargo owned by British merchants, Sir W. Scott said:—

"* * * It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

"In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted.

"[1] *Gerasimo*, 11 Moore P. C. 100."

"[2] *See* the American cases: *Rapid*, 8 Cranch, 155. *Alexander, ib.*, 169; but *see* the *Ocean*, 5 C. Rob., 91, and Dr. Robinson's note to this case."

"[3] *Madonna delle Gracie*, 4 C. Rob., 195."

"[4] *Ceres*, 3 C. Rob., 79. *Nayade*, 4 C. Rob., 251. *Neptunus* ,6 C. Rob., 403."

It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as a universal principle of law; 'Ex nature belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso, tamen jure belli commercia esse vetita, ipsae indicationes bellorum satis decarant,' &c. He proceeds to observe that the interests of trade and the necessity of obtaining certain commodities have sometimes so far overpowered this rule that different species of traffic have been permitted, *prout e re sua, subditorumque suorum esse censent principes* (Bynk., Q. J. P. B. 1, c. 3). But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quo ad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principes*. It appears from these passages to have been the law of Holland; Valin, 1, iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels; it will appear in a case which I shall have occasion to mention, *The Fortuna*, to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

"By the law and Constitution of this country, the sovereign alone has the power of declaring war and peace. He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the State. It is for the State alone, on more enlarged views of policy, and of all circumstances which may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the Government, charged with the care of the public safety?

"Another principle of law, of a less public nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country

applies this principle with great rigour. The same principle is received in our Courts of the law of nations; they are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy—such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *ex lex;* even in the case of ransoms which are contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the Courts of his own country, for the recovery of his freedom. A State in which contracts can not be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter vii., where he lays down that the legality of commerce and the mutual use of Courts of Justice are inseparable; he says that cases of commerce are undistinguishable from cases of any other species in this respect: 'Si hosti semel permittas actiones execere, difficile est distinguere ex quâ causâ oriuntur, nec potui animadvertere illam distinctionem usu fuisse servatam.'

"Upon these and similar grounds it has been the established rule of law of this Court, confirmed by the judgment of the Supreme Court, that a trading with the enemy, except under a royal license, subjects the property to confiscation; and the most eminent persons of the law sitting in the Supreme Court have uniformly sustained such judgments. * * *

"I omit many other cases of the last and the present war merely on this ground, that the rule is so firmly established that no one case exists which has been permitted to contravene it—for I take upon me to aver that all cases of this kind which have come before that tribunal have received a uniform determination. The cases which I have produced prove that the rule has been rigidly enforced; where Acts of Parliament have on different occasions been made to relax the navigation law and other revenue Acts; where the Government has authorized, under the sanction of an Act of Parliament, a homeward trade from the enemy's possession, but has not especially protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claim, not merely of convenience, but almost of necessity, excused it, on behalf of the individual; that it has been enforced where carriages have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the Crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied States in war had a right to notice and apply, mutually, to each

other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England. (Gist *v.* Mason, I T. R., 85.)"

The *Indian Chief* (1801) (3 C. Rob. 12, Scott, 588) : The court said that it is "the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy."

The *Julia* (1814) (8 Cranch, 181) : "The ground upon which trading with the enemy is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptation of unlimited intercourse, or sold by the cupidity of corrupted avarice. In the language of Sir William Scott, I would ask, 'Who can be insensible to the consequences that might follow, if every person, in time of war, had a right to carry on commercial intercourse with the enemy, and, under color of that right, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?' Nor is there any difference between a direct intercourse through the medium of a neutral port. The latter is as strictly prohibited as the former. (The *Jonge Pietre*, 4 Rob. 65, 79.)

"It is argued, that the cases of trading with the enemy are not applicable, because there is no evidence of actual commerce; and an irresistible presumption arises from the nature of the voyage to a neutral port, that no such trade is intended. If I am right in the position, that all intercourse, which humanity or necessity does not require, is prohibited, it will not be very material to decide, whether there be a technical commerce or not. But is it clear, beyond all doubt, that no inference can arise of an actual commerce? The license is issued by the agents of the British government, and, I must presume, under its authority. It is sold (as it is stated) in the market; and if it be a valuable acquisition, the price must be proportionate. If such licenses be an article of sale, I beg to know, in what respect they can be distinguished from the sale of merchandise? If purchased directly from the British government, would it not be a traffic with the enemy: If purchased indirectly, can it change the nature of the transaction? It has been said, that if purchased of a neutral, the trade in licenses is no more illegal than the purchase of goods of the enemy fabric, bona fide conveyed to neutrals. Perhaps, this may, under circumstances, be correct; but I do not understand that the purchase of goods of enemy manufacture, and avowedly belonging to an enemy, is legalized by the mere fact of the sale being made in a neutral port. The goods must have become incorporated into the general stock of neutral trade, before a belligerent can lawfully become a purchaser. If such licenses be a legitimate article of sale, will they not enable the British government to raise a revenue from our citizens, and thereby add to their resources of war? Admit, however, that they are not so sold, but are a measure

of policy adopted by Great Britain to further her own interests, and ensure a constant supply of the necessaries of life, either in or through neutral countries; can it be asserted, that an American citizen is wholly blameless, who enters into stipulations and engagements to effect their purposes? Is not the enemy thereby relieved from the pressure of the war, and enabled to wage it more successfully against the other branches of the same commerce, not protected by this indulgence?

"It is said, that the case of a personal license is not distinguishable from a general order of council authorizing and protecting all trade to a neutral country. In my judgment, they are very distinguishable. The first presupposes a personal communication with the enemy, and an avowed intention of furthering his objects, to the exclusion of the general trade by other merchants to the same country; it has a direct tendency to prevent such general trade; and relieves the enemy from the necessity of resorting to a general order of protection; it contaminates the commercial enterprises of the favored individual with purposes not reconcilable with the general policy of his country; exposes him to extraordinary temptations to succor the enemy by intelligence; and separates him from the general character of his country, by clothing him with all the effective interests of a neutral. Now, these are some of the leading principles upon which a trade with the enemy has been adjudged illegal, by the law of nations. On the other hand, a general order opens the whole trade of the neutral country to every merchant. It pre-supposes no incorporation in enemy interests; it enables the whole mercantile enterprise of the country to engage upon equal terms with the traffic; and it separates no individual from the general national character. It relaxes the rigor of war, not only in that particular trade, but collaterally opens a path to other commerce. There is all the difference between the cases, that there is between an active personal cooperation in the measures of the enemy, and the merely accidental aim afforded by the pursuit of a fair and legitimate commerce.

"In the purchase or gratuity of a license for trade, there is an implied agreement that the party shall not employ it to the injury of grantor; that he shall conduct himself in a perfectly neutral manner, and avoid every hostile conduct. I say, there is an implied agreement to this effect, in the very terms and nature of the engagement. I am warranted in declaring this, from the uniform construction put by Great Britain on the conduct of her own subjects acting under licenses. Can an American citizen be permitted, in this manner, to carve out for himself a neutrality on the ocean, when his country is at war? Can he justify himself in refusing to aid his countrymen who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services, when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal interest at variance with the legitimate objects of his government? I confess, that I am slow to believe, that the principles of national law, which formerly considered the lives and properties of all enemies as liable to the arbitrary disposal of their adversary, are so far relaxed, that a part of the people may claim to be at peace, while the residue are involved in the desolations of war.

"The existence and employment of such a license affords a strong presumption of concealed enemy interest, or at least, of ultimate destination for enemy use. It is inconceivable, that any government should allow its protection to an enemy trade, merely out of favor to a neutral nation, or to an ally, or to its enemy. Its own particular and special interests will govern its policy; and the *quid pro quo* must materially enter into every such relaxation of belligerent rights. It is, therefore, a fair inference, either that its subjects partake of the trade, under cover, or that the property, or some portion of the profits, finds its way into the channel of the public interests.

"It has been argued, that the voyage was lawful to a neutral port, and the mere use of a license cannot cover a lawful voyage with the taint of illegality. This, however, is assuming the very point in controversy. It is not universally true, that a destination to a neutral port gives a *bona fide* character to the voyage. If the property be ultimately destined for an enemy port, or an enemy use, it is clear, that the interposition of a neutral port will not save it from condemnation. (The *Jonge Pietre*, 4 Rob. 65, 79.) Suppose, in the present case, the vessel and cargo had been destined to Lisbon, for the express use of the British fleet there, could there be a doubt, that it would have been a direct trade with the enemy? Whether the voyage, therefore, be legal or not, depends not merely upon the destination, but the ultimate application of the property, or the ascertained intentions of the party. A contract to carry provisions to St. Bartholomews, for the ultimate supply of the British West-India Islands, would be just as much an infringement of the law of war, as a contract for a direct transportation. On the whole, I adopt, as a salutary maxim of war, the doctrine of Bynkershoek 'Vetatur quoquo modo hostium utilitati consulere.' It is unlawful in any manner to lend assistance to the enemy, by attaching ourselves to his policy, sailing under his protection, facilitating his supplies, and separating ourselves from the common character of our country." (See also to same effect the *Aurora*, 8 Cranch, 203.)

In the case of Amory et al *v.* M'Gregor (1818) (15 Johns. (N. Y.) 23), involving questions on a contract covering the shipment of a cargo of goods by an American merchant from England shortly after the declaration of war between the United States and Great Britain in 1812 and before such declaration was known in England, will be found the following review of the early decisions of the Supreme Court of the United States on the question of trading with the enemy:—"That all *trading* with an enemy is illegal, is a general and well-settled rule. The principle is recognized and sanctioned as well by the common law as by the maritime codes of all *European* nations. (8 *Term. Rep.* 554.) It is a wise and salutary rule; but it would require the most direct and controlling authority, to satisfy my mind, that the mere act of withdrawing goods from the enemy's country, at the breaking out of a war, comes within the reason or policy of the rule; and no case has fallen under my observation, that has pressed the principle thus far. Several cases, in the Supreme Court of the United States, have been referred to, as containing that doctrine; but, on examination, they will not be found to support it. The case of the *Rapid*, (8 Cranch, 155), has been relied on, as one of the strongest. But that case was essentially different from the present, and decided upon a very distinct principle. *Harrison*, the claimant, who was an *American* citizen, had purchased a quantity of *English*

goods, before the declaration of war, and deposited them on a small island belonging to the *English*, near the line between the *United States* and *Nova Scotia;* and after the declaration of war, he sent a vessel, licensed, and enrolled for the cod fishery, and brought the goods away, which, on their return, were captured by an *American* privateer, and condemned, in the Circuit Court of *Massachusetts*, for *trading with the enemy.* On appeal, this sentence was affirmed. Judge Johnson, in delivering the opinion of the Court, expressly waives giving any opinion upon the point now under consideration, although in very strong and emphatic language, he interdicts all intercourse with the enemy. In a state of war, he says, nation is known to nation only by their armed exterior, each threatening the other with conquest or annihilation. The individuals, who compose the belligerent states, exist, as to each other, in a state of utter occlusion. In war, every individual of one nation must acknowledge every individual of the other nation as his own enemy. Trading, says he, does not consist in negotiation, or contract, but the object, policy and spirit of the rule is, to cut off all communication, or actual locomotive intercourse, between individuals of the belligerent states. Contract has no connection with the offence. *Intercourse, inconsistent with actual hostility*, is the offence against which the operation of the rule is directed. But, after thus narrowing all intercourse, he says, whether, on the breaking out of a war, the citizen has a right to remove to his own country, *with his property*, is not the question before the Court. *The claimant had no right to leave the United States, for the purpose of bringing home his property from an enemy's country.* This was the point on which the decision turned. So, again, in the case of the *St. Lawrence* (8 Cranch. 434), the Court say they do not mean to decide on the right of an *American* citizen, having funds in *England*, to withdraw them, after a declaration of war, or as to the latitude which he may be allowed in the exercise of such a right, if it exists. That Judge Story did not mean to be understood as deciding this question, in the case of the *Rapid*, is evident from what fell from him in the case of the *St. Lawrence*, when again before the Court; (9 Cranch. 121.) he says, that it is not the intention of the Court to express any opinion, as to the right of an *American* citizen, on the breaking out of hostilities, to withdraw his property, purchased before the war, from an enemy's country. Admitting such a right to exist, it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities.

"Thus, it will be seen, that this question never has been decided in the Supreme Court of the *United States.* And, from the guarded and cautious manner in which that Court has reserved itself, upon this partciular question, there is reason to conclude, that when it is distinctly presented, it will be considered as not coming within the policy of the rule, that renders all trading or intercourse with the enemy illegal.

"In Hallet & Bowne *v.* Jenks (3 Cranch, 219), the question before the Court involved the inquiry, as to what circumstances might excuse a trading, without incurring the penalties of the non-intercourse act of 1798. Chief Justice Marshall, in delivering the opinion of the Court, observes, that even if *an actual and general war* had existed between this country and *France*, and the plaintiff had been

driven into a *French* port, a part of his cargo seized, and he had been permitted to sell the residue, and purchase a new cargo, it would not have been deemed *such a traffic* with the enemy, as would vitiate the policy upon such new cargo. According to this opinion, an actual trading with the enemy may, under such circumstances, be deemed lawful. Independent, however, of this general question, the withdrawing of the goods in question, may very fairly be considered as falling within the principle settled by the Supreme Court of the United States, in the case of the *Thomas Gibbons*, (8 Cranch. 421). It was there held, that a shipment made, even after a knowledge of the war, may well be deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period, as would leave a reasonable presumption, that the knowledge of that repeal would induce a suspension of hostilities on the part of the *United States;* and that Congress had acted upon that principle, by the act of the 2d of *January*, 1813 (ch. 149.) and fixed the time (15 *Sept.* 1812), before which shipments might be reasonably made, upon the faith of that presumption. The same doctrine is again recognized, and more liberally applied, in the case of the *Mary*. (9 Cranch. 147). The shipment, in the case now before the Court, was on the 21st of July, and before the declaration of war was known in *England*. From this view of the case, and the law applicable to it, we are satisfied, that withdrawing the goods, under such circumstances, could not be considered an illegal act."

In the case of *The Baigorry* (1864) 2 Wall. 474, it was held that both ship and cargo, owned by neutrals resident in an enemy port, "were liable to be condemned as enemies' property, because of the employment of the vessel in enemies' trade, and because of the attempt to violate the blockade, and to elude visitation and search by the *Bainbridge*."

In the case of the *Benito Estenger* (1899) (176 U. S. 568, Scott, 621), Mr. Chief Justice Fuller says: "The claimant asserted and the consul denied that protection to the voyage was extended by the latter. But we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation. This was so held by Judge McCaleb in Rogers *v.* The Amado, Newberry, 400, in which he quotes the language of Sir William Scott in *The Hope*, 1 Dodson, 226, 229: 'To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories* or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. "*Ei rei non praeponitur;*" and therefore his acts relating to it are not binding.'

"In *The Joseph*, 8 Cranch, 451, the vessel was condemned for trading with the enemy; and it was held that she was not excused by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States. The court said that these considerations, 'if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision.'

"This is equally true of the case before us, for even if the circumstances may have justified liberal treatment, that can not be permitted to influence our decision. It belongs to another department of the Government to extend such amelioration as appears to be demanded in particular instances.

"Neither the case *Les Cinq Freres*, 4 Lebau's Nouveau Code des Prises, 63, nor that of *The Maria*, 6 C. Rob. 201, cited by counsel, is in point. In the former, the Committee of Public Safety in the year 3 of the French calendar of the Revolution decreed the condemnation of *Les Cinq Freres* as an enemy's vessel, and of her cargo, although belonging to Frenchmen, but further decreed restitution of the cargo or its value, as matter of grace, in consideration of services rendered by the claimants in furnishing provisions to the republic, adding that this should not be drawn into a precedent. The latter simply involved the interpretation of an indulgence specifically granted by the British Government."

"In the only prize-case decided during the South African War, *The Mashona*, the Supreme Court in the Cape condemned the British ship and the cargo of English merchants destined for the Transvaal, including goods consigned to domiciled neutrals, on the ground that it was an infringement of the law of non-intercourse. De Villiers, C. J., in his judgment, said:

"'The law is clear that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the license of their respective governments. * * * The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant, carrying on trade in a belligerent country, has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity he is treated, for the purpose of the trade, as the subject of the Power under whose dominion he carries it on and as an enemy by those with whom that Power is at war.'

"(Reported in *Journal of Society of Comparative Legislation*, N. S., vol. ii, 1900, pp. 326–7.)"

Bentwich, Leading Cases, p. 165.

The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.—*Article 58, Declaration of London, 1909.*

"41. As regards the ownership of goods, the system of continental jurisprudence is to apply the test of the nationality of the owner, while British practice, followed also by Japan, the Netherlands, and, it is understood, the United States, attributes neutral or enemy character to property according as the owner is domiciled for the purposes of his trade or business in a neutral or enemy country. The principle of domicile appears to His Majesty's Government to be both sounder and more practical. There is a good deal of support for it in the works of writers on international law, and even the French Government, during the war of 1870–1, issued a notice based upon the British view, although the principle was not adopted in their prize decisions. His Majesty's Government doubt whether, as a practical matter, the interest of Great Britain would be materially affected by the general adoption of the continental rule of nationality. Enemy property, except contraband, is, by the Declaration of Paris, exempt from seizure when on board neutral vessels, and it is probable that in any war in which one of the belligerents had a decided naval preponderance, the enemy's mercantile marine would be speedily driven from the seas, and that consequently opportunities for capturing enemy property on board enemy ships would rapidly disappear as the war proceeded. Whilst therefore His Majesty's Government consider that the test of domicile is in every respect preferable, they do not think the principle involved is of such importance as to make insistence upon it a vital matter. Your endeavour should accordingly be to secure, if possible, the general acceptance of the test of domicile, but not to take a determined stand on its maintenance, should such an attitude stand in the way of reaching any agreement."

Instructions, Dec. 1, 1908, from Sir Edward Grey to Lord Desart, British delegate to the London Conference. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 32.

"Under head[1] (*h*) the British program mentions the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property. This question was subjected to a searching examination by a special committee, which had to acknowledge the uncertainty of actual practice; it was proposed to put an end to this by the following provisions:

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of

[1] (*h*) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

no nationality or of double nationality (i. e., both neutral and enemy), by his domicile in a neutral or enemy country; provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral country."

Unanimity not being forthcoming, these provisions remained without effect."

General report of drafting committee to London Naval Conference.

"Unlike ships, goods have no individuality of their own; their neutral or enemy character is made to depend upon the personal status of their owner. This opinion prevailed after an exhaustive study of different views, which inclined toward reliance on the country of origin of the goods, the status of the person at whose risk they are, of the consignee, or of the consignor. The test adopted in article 58 appears, moreover, to be in conformity with the terms of the declaration of Paris, as also with those of the convention of The Hague of the 18th October, 1907, relative to the establishment of an international prize court, where the expression "neutral or enemy property" is used. (Arts. 1, 3, 4, 8.)

But it can not be concealed that article 58 solves no more than a part of the problem, and that the easier part; it is the neutral or enemy character of the owner which determines the character of the goods, but what is to determine the neutral or enemy character of the owner? On this point nothing is said, because it was found impossible to arrive at an agreement. Opinions were divided between domicile and nationality; no useful purpose will be served by reproducing here the arguments adduced to support the two positions. It was hoped that a compromise might have been reached on the basis of a clause to the following effect:

"The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy nationality of their owner, or, if he is of no nationality or of double nationality (i. e., both neutral and enemy), by his domicile in a neutral or enemy country;

"Provided that goods belonging to a limited liability or joint stock company are considered as neutral or enemy according as the company has its headquarters in a neutral or enemy country."

But there was no unanimity."

General report of drafting committee to London Naval Conference.

"32. More difficult than the question of how to determine the nationality of a ship was that of deciding the enemy or neutral character of goods on board. A special committee of the Conference, on which all the delegations were represented, was at work for a prolonged period, endeavoring to formulate a rule on this subject which could be accepted by all; but the fundamental differences underlying the systems of jurisprudence which rely upon the criterion of domicile and of nationality respectively, proved incapable of being bridged. The adherents of the rival systems were evenly divided in the committee. Having regard to the consideration to which attention is called in our general instructions, that the practical application of any rule on the subject of enemy property is bound to be narrowly restricted, and realizing that any definite settlement would probably be preferable to the continued uncertainty as to the rules which the International Court would apply on this subject, we were disposed to make a concession and

agree to the adoption of the principle of nationality, if unanimity could be attained on this basis. This condition, however, was not fulfilled, as the Powers were not all prepared to accept such a solution. It was inevitable, in these circumstances, that this question also should remain an open one. Whilst we consider this to be a matter for sincere regret, we do not fail to recognize that, if the equal division of votes in the committee of the Conference may serve as some indication of the way in which the question may be viewed generally by the judges of the International Court, it is by no means certain that they will not eventually adopt the principle of domicile."

Report, March 1, 1909, of the British Delegates at the Naval Conference to Sir Edward Grey. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 100.

Contra.

"ART. XV. It is likewise agreed that, in the case where the neutral flag of one of the contracting parties shall protect the property of the enemies of the other, by virtue of the above stipulation, it shall always be understood that the neutral property found on board such enemy's vessels shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the contracting parties agree that, four months having elapsed after the declaration, their citizens shall not plead ignorance thereof. On the contrary, if the flag of the neutral does not protect the enemy's property, in that case the goods and merchandise of the neutral embarked in such enemy's ship shall be free."

Treaty of 1828, United States and Brazil. Treaties, &c., of United States, Malloy, vol. 1, p. 138.

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Treaty between United States and Columbia, 1846. Treateis, &c., of United States, Malloy, vol. 1, p. 307.

"ART. 51. * * * The enemy or neutral character of goods found on board an enemy vessel is determined by the enemy or the neutral character of the owner.

"Each State must declare, not later than the outbreak of hostilities, whether the enemy or neutral character of the owner of the goods is determined by his place of residence or his nationality."

Institute (1913), p. 186.

National Character Acquired by Residence or Maintenance of Commercial Establishment.

"If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by law of the nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character, during his residence and occupation in an enemy's country." * * *

It has been held by the courts of the United States that if a person "resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade. He takes the advantages and disadvantages, whatever they may be, of the country of his residence. The doctrine is founded on the principles of national law, and accords with the reason and practice of all civilized nations." * * *

"It has been a question admitting of much discussion and difficulty, arising from the complicated character of commercial speculations, what state of facts constitutes a residence so as to change or fix the commercial character of the party. The *animus manendi* appears to have been the point to be settled. The presumption, arising from actual residence in any place, is, that the party is there *animo manendi*, and it lies upon him to remove the presumption, if it should be requisite for his safety. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial. If there be no such intention, and the residence be involuntary or constrained, then a residence, however long, does not change the original character of the party, or give him a new and hostile one. But the circumstances requisite to establish the domicile are flexible, and easily accommodated to the real truth and equity of the case. Thus it requires fewer circumstances to constitute domicile in the case of a native subject, who returns to reassume his original character, than it does to impress the national character on a stranger. The *quo animo* is, in each case, the real subject of inquiry; and when the residence exists freely, without force or restraint, it is usually held to be complete, whether it be an actual, or only an implied residence.

"When the residence is once fixed, and has communicated a national character to the party, it is not divested by a periodical absence, or even by occasional visits to his native country. Nor is it invariably necessary that the residence be personal, in order to impress a person with a national character. The general rule undoubtedly is, that a neutral merchant may trade in the ordinary manner to the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person. But if the principal be trading, not on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy, such a privileged trade puts him on the same ground with their own subjects, and he would be considered as sufficiently invested with the

national character by the residence of his agent. Sir William Scott, in the case of the *Anna Catharina*,[1] applied this distinction to the case of a neutral, invested with the privileges of a Spanish merchant, and the full benefit of the Spanish character; and this case has been followed to its fullest extent in this country. It affords a sample of that piercing and unwearied investigation which the courts of admiralty have displayed in unravelling the intricate process by which an enemy's trade was attempted to be protected from hostile seizure, and in the application of sound principles of national law to new and complex cases. On the same ground it has been decided, that an American consul-general in Scotland, committing his whole duty to vice-consuls, was deemed to have lost his neutral character by engaging in trade in France; and it is well settled, that if a foreign consul carries on trade as a merchant, in an enemy's country, his consular residence and character will not protect that trade from interruption by seizure and condemnation as enemy's property.

"A national character, acquired by residence, may be thrown off at pleasure, by a return to the native country. It is an adventitious character, and ceases by non-residence, or when the party puts himself in motion *bona fide*, to quit the country *sine animo revertendi;* and such an intention is essential, in order to enable the party to reassume his native character. In the case of the *Venus*, the decisions of the English courts on the subject of national character acquired by residence, and on the consequences of such acquired character, were recognized as being founded on sound principles of public law. It was declared, that the law of nations distinguishes between a temporary residence in a foreign country for a special purpose, and a residence, accompanied with an intention to make it the party's domicile, or permanent place of abode; and that the doctrine of the prize courts, and the common-law courts of England, was the same on this subject with that of the public jurists. As a consequence of the doctrine of domicile, the court decided, that if a citizen of the United States should establish his commercial domicile in a foreign country, and hostilities should afterwards break out between that country and the United States, his property, shipped before knowledge of the war, and while that domicile continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of that country. The hostile character was deemed to attach to the American citizen only in respect to his property connected with his residence in the enemy's country; and the converse of the proposition was also true, that the subject of a belligerent state, domiciled in a neutral country, was to be considered a neutral by both the belligerents, in reference to his trade. The doctrine of enemy's property, arising from a domicile in an enemy's country, is enforced strictly; and equitable qualifications of the rule are generally disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty.

"In the law of nations, as to Europe, the rule is, that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. * * *

[1] 5 Rob., 161.

"National character may be acquired in consideration of the traffic in which the party is concerned. If a person connects himself with a house of trade in the enemy's country, in time of war, or continues during a war a connection formed in a time of peace, he cannot protect himself by having his domicile in a neutral country. He is considered as impressed with a hostile character in reference to so much of his commerce as may be connected with that establishment. The rule is the same, whether he maintains that establishment as a partner or as a sole trader. The Supreme Court of the United States, referring to the English prize cases on this subject observed, that they considered the rule to be inflexibly settled, and that they were not at liberty to depart from it, whatever doubt might have been entertained if the case was entirely new.

"But though a belligerent has a right to consider as enemies all persons who reside in a hostile country, or maintain commercial establishments there, whether they be by birth neutrals, or allies, or fellow-subjects, yet the rule is accompanied with this equitable qualification, that they are enemies *sub modo* only, or in reference to so much of their property as is connected with that residence or establishment. This nice and subtle distinction allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country. So there may be a partnership between two persons, the one residing in a neutral, and the other in a belligerent country, and the trade of one of them with the enemy will be held lawful, and that of the other unlawful, and consequently the share of one partner in the joint traffic will be condemned, while that of the other will be restored. This distinction has been frequently sustained, notwithstanding the difficulties that may attend the discrimination between the innocent and the noxious trade, and the rule has been introduced into the maritime law of this country."

Kent, vol. 1, pp. 83–89.

Produce of Soil.

"It was considered by Sir William Scott, in the case of the *Phoenix*, (5 C. Rob. 20) and again, in the case of the *Vrow Anna Catharina*, (5 C. Rob. 161), to be a fixed principle of maritime law, that the possession of the soil impressed upon the owner the character of the country, so far as the produce of the soil was concerned, wherever the local residence of the owner might be. The produce of a hostile soil bears a hostile character for the purpose of capture, and is the subject of legitimate prize when taken in a course of transportation to any other country. The enemy's lands are supposed to be a great source of his wealth, and, perhaps, the most solid foundation of his power; and whoever owns or possesses land in the enemy's country, though he may in fact reside elsewhere, and be in every other respect a neutral or friend, must be taken to have incorporated himself with the nation, so far as he is a holder of the soil; and the produce of that soil is held to be enemy's property, independent of the personal residence or occupation of the owner. The reasonableness of this principle will be acceded to by all maritime nations;

and it was particularly recognized as a valid doctrine by the Supreme Court of the United States, in Bentzon *v.* Boyle (9 Cranch, 191)."

Kent, vol. 1, pp. 82, 83.

"The legality, or illegality of the capture of goods upon the high seas, will frequently turn upon the question of ownership at the time of capture; for when property is shipped from a neutral country to an enemy's, or from an enemy's country to a neutral, the question of its national character, whether it is neutral or hostile, can only be determined, by ascertaining whether the right of property, at the time of shipment was vested in the shipper or in the consignee. If, in order to determine this question, we were to refer only to the rules established by courts of civil and common law, we should be liable to form an erroneous conclusion, as these rules differ in some respects from those which govern courts of prize, while, in others, they are precisely the same in all courts."

Halleck, p. 473.

Commercial Domicile.

"The national character of a merchant is determined by his *commercial domicil*, and not by the country to which his allegiance is due, either by his birth, or by his subsequent naturalization or adoption. He is regarded as a political member of the nation into which, by his residence and business, he is incorporated, and as a subject of the government which protects him in his pursuits, and to the support of which he contributes by his property and his industry. This rule of decision is adopted both in prize courts and in courts of common law, and is applied, in a belligerent country, to its own native subjects, as well as to those of a neutral power. Thus, a citizen of the United States who is settled abroad, during a war to which his government is a party, is, with respect to his property and trade, subject to all the disabilities of an alien enemy, or entitled to all the privileges of a neutral, according to the hostile or neutral character of the country in which he has fixed his domicil.

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"The question of domicil is often a very difficult one to determine, and involves considerations which require to be weighed with peculiar care. It is also sometimes connected with circumstances of varied and conflicting import, which are well calculated to embarrass the mind of the most experienced judge. The great controlling principle, however, in determining domicile is the *intention* of the party. And when his intention to reside for an indefinite period or permanently, in the place where he is found, is established by proof, the length or brevity of his actual residence is of no avail to protect him from the consequences of the national character resulting from such residence. Thus, the property of a British merchant, who removed to a Dutch West India island but a day or two before it capitulated to a British force, was condemned by a British court as that of an enemy, it being proved that he had gone there with the avowed design of forming a permanent establishment.

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"Another and most significant circumstance by which the intention may be ascertained, is the *time* of residence. In most cases, this circumstance is unavoidably conclusive in determining domicil. Even

where the party had first gone to a foreign country for a special purpose, which would repel the presumption that he intended to make it his permanent residence, yet if he has remained a great length of time, it will be presumed that his first intention has been changed, and that a general residence has grown, as is frequently the case, upon a special purpose. Hence, the plea of an original special purpose is not to be averred against a residence continued for a long period of time. If, however, a merchant has gone to a foreign country just before the war, for a special purpose, a fair time should be allowed to him to disengage himself; but if he should continue there during a good part of the war, contributing, by his industry and means, to the strength and security of the enemy, the plea of a special purpose cannot be urged with effect against the rights of hostility.

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"The presumption of law with respect to residence in a foreign country, is, that the party is there *animo manendi*, and it lies upon him to explain it. Thus, when the property of a foreigner, who, at the time of its shipment, was living in a hostile country, is seized as that of an enemy, the captors are not bound to prove that his place of residence was his actual domicil; but it rests upon him to disprove the presumption of the law, and, to redeem his property from the noxious imputation, he must give such evidence of his intentions and plans, as shall be effectual to destroy it.

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"Where the property seized for illegal trafic with the enemy, belongs to a house of trade, established in a neutral country, but of which one of the partners is a resident subject of the belligerent country, his share, notwithstanding the neutrality of the house, is condemned. The rule is equally applicable, even where the belligerent party is strictly dormant, and takes no part whatever in the direction and management of the affairs of such trading house. If he is a party interested in the property so contaminated, he must suffer the penalty of the offense. He cannot engage as a partner in a transaction in which he could not lawfully engage, if alone."

Halleck, pp. 701, 703, 706, 707, 506.

"The effect of domicile, or commercial inhabitancy, upon national character, was recognized by the continental court of appeals in prize causes, during the war of the revolution. (2 Dall. 42, Claim of Mr. Vantylengen.) It was determined by the supreme court, during the hostilities with France, that a citizen residing in a foreign neutral country, acquired the commercial privileges attached to his domicile, and was, consequently, exempt from the operation of the law of his own country, suspending the intercourse with the French dominions. (Murray *v.* The *Charming Betsey*, 2. Cr. 65.) The national legislature have adopted the same principle in the act of the 3d of March, 1800 [2 Stat., 16], applying the rule of reciprocity in cases of salvage to 'the vessels or goods of persons permanently resident within the territory, and under the protection, of any foreign government,' etc.; and finally, before the case of the *Venus* (2 Cr. 253), the supreme court applied the same principle to the law of insurance, and held a warranty of neutrality to be satisfied by the residence of the party as a merchant, in a neutral country. (Livingston *v.* Maryland Insurance Company, 7 Cr. 506.) This was an action on a policy of

insurance, containing a warranty that the property was neutral. That warranty was determined to be satisfied, by the emigration of the party, a Spanish subject, to the United States, and residing there, before the breaking out of the war in 1804, between Great Britain and Spain, the property having been captured by a British cruiser, and condemned in the prize court at Halifax, as Spanish property. A majority of the court were of opinion, that the assured was to be considered as a merchant of the United States, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces. See also, Arnold *v.* United Insurance Co., 1 Johns. Cas., 363; Jenks *v.* Hallet, 1 Caines, 60; Johnston *v.* Ludlow, 2 John. Cas., 481; s. c. 1 Caines' Cas., 29; Duguet *v.* Rindelander, 2 Johns. Cas., 476.

"It is much to be lamented, that we have not printed reports of the decisions in the British supreme court of prize, as many interesting points have been decided before the Lords of Appeal, of which we have no other account than occasional loose references to them. Among these is the case of Mr. Dutilh, mentioned by Dr. Robinson in the *Indian Chief*, 3 Rob. 21, which is more particularly stated by Sir John Nicholl, in a manuscript report, in the possession of the editor, of the hearing of the case of the *Harmony*, before the Lords, 7th of July, 1803. 'The case of Dutilh also illustrates the present. He came over to Europe, as it is stated, in 1793, about the end of July, a time when there was a great deal of alarm on account of the state of commerce in Europe. He went to Holland, then not only in a state of amity, but also of alliance with this country; he continued there, until the French entered. During the whole time he was there, he was without any establishment. He had no counting-house; he had no contracts nor dealings with contractors there. He employed merchants there, to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice, to know what was left for him to do, under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilh applied to Mr. Adams, who advised him to stay, until he could get a passport. He continued there, until the latter end of that year, and having wound up his concerns he came away. Some part of his property was captured, before he came there. That part which was taken, before he came there, was restored to him (The *Fair American*, Adm. 1796), but that part which was taken, while he was there, was condemned, and that because he was in Holland at the time of capture.' (The *Hannibal and Pomona*, Lords, 1800.)"

Wheaton's note to the *Mary and Susan* (1816), 1 Wheat. 55.

"A neutral subject, domiciled in the belligerent state, is considered as a merchant of that country, so as to render his property, taken in trade with the enemy, liable to capture and confiscation, in the same manner as that of persons owing permanent allegiance to the state. The *Indian Chief*, 3 Rob. 26. The converse of the rule is also applied to subjects or citizens of the belligerent state, resident in a neutral country, whose trade with the enemy is considered as

lawful; except in contraband of war, which is deemed inconsistent with their permanent allegiance, and, it may be added, is equally prohibited to them in their character of neutral merchants. See *The Neptunus*, 6 Rob. 408."

Wheaton's note to the *Rugen* (1816), 1 Wheat. 65.

American Rule as to Domicile or Commercial Inhabitancy.

The English rule that the domicile, or commercial inhabitancy, of a person in the enemy's country made his goods, engaged in trade, liable to capture as enemy goods, was "adopted by the prize tribunals of the United States, during the" war of 1812 with Great Britain. "The rule was applied to the case of native British subjects [The *Venus*, 8 Cranch, 277], who had emigrated to the United States long before the war, and became naturalized citizens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in questions were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

"In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicil of the claimants was asserted, the questions of law to be considered were two: *First*, by what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? and, *secondly*, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or that in which he had been naturalized?

"Upon the first of these questions, the opinions of the text-writers and the decisions of the British Courts of Prize already cited, were referred to; but it was added that, in deciding whether a person has obtained the right of an acquired domicil, it was not to be expected that much, if any assistance, should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts of justice to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil has sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he has made no express declaration on the subject, and his secret intention is to be discovered, his *acts* must be attended to as affording the most satisfactory evidence of his intention. On this ground the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside there, as to stamp

him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by residence even of a few days. This was one of the rules of the British Prize Courts, and it appeared to be perfectly reasonable. Another was that a neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi;* and if a State at war should bring his national character into question, it lies upon him to explain the circumstances of his residence. As to some other rules of the Prize Courts of England, particularly those which fix the national character of a person, on the ground of constructive residence or the peculiar nature of his trade, the court was not called upon to give an opinion at that time; because, in the present case, it was admitted that the claimants had acquired a right of domicil in Great Britain at the time of the breaking out of the war between that country and the United States.

"The next question was, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes permanent allegiance. A neutral, in this situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance; but although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the enemy's trade as is connected with his residence. It is found adhering to the enemy; he is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or perhaps refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with the rest of the world.

"But this national character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least

rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the enemy's country to his own, then neutral, and therefore that, as a neutral, the trade was to him lawful? If war exists between the country of his residence and his native country, and his property be seized by the former or by the latter, shall he be heard to say, in the former case, that he was a domiciled subject in the country of the captor; and in the latter that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character, and thus to parry the belligerent rights of both? It was to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned had been adopted. Upon what sound principle could a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicil; and when war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that this property, which was once the property of a friend, belongs now to him who, in reference to that property, is an enemy.

"This doctrine of the common-law courts and prize tribunals of England is founded, like that mentioned under the first head, upon international law, and was believed to be strongly supported by reason and justice. And why, it might be confidently asked, should not the property of enemy's subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound by such residence to the society of which they were members, subject to the laws of the State, and owing a qualified allegiance thereto. They are obliged to defend it, (with an exception of such subject with relation to his native country,) in return for the protection it affords them, and the privileges which the laws bestow upon them, as subjects. The property of such persons, equally with that of the native subjects in their locality, is to be considered as the goods of the nation, *in regard to other States.* It belongs in some sort to the State, from the right which the State has over the goods

of its citizens, which make a part of the sum total of its riches, and augment its power. Vattel, liv. i, ch. 14, sec. 182. 'In reprisals,' continues the same author, 'we seize on the property of the subject, just as on that of the sovereign; every thing that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit intrusted to the public faith.' Liv. ii. ch. 18, sec. 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow, in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

"If, then, nothing but an actual removal, or a *bonâ fide* beginning to remove, could change a national character acquired by domicil; and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject; what was there that did or ought to exempt it from capture by the cruisers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent?

"It was contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes permanent allegiance; and that, until such election be made, his property ought to be protected from capture by the cruisers of the latter. This doctrine was believed to be as unfounded in reason and justice, as it clearly was in law. In the first place, it was founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It was said, that the presumption ought to be made, because, upon receiving information of the war, it would be his duty to return home. This position was denied. It was his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor would any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse permission to him to withdraw whenever he wished to do so, unless under peculiar circumstances, which, by such removal, at a critical period, might endanger the public safety. The conventional law of nations was in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each party shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects to remove or remain. They are left free to choose for themselves; and, when they have made their election, may claim the right of enjoying it, under the treaty. But until the election is made, their former character continues unchanged. Until this election is made, if the claimant's property found upon the high seas, engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free, under a notion that he may elect to remove upon notice of the war, and should arrive safe; what is

to be done, in case the owner of it should elect to remain where he is? For if captured, and brought immediately to adjudication, it must, upon this doctrine, be acquitted, until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all and can lose nothing. If he, after the capture, should find it for his interest to remain where he is domiciled, his property, embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine producing such contradictory consequences was not only unsupported by any authority, but would violate principles long and well established in the Prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to America, to be disregarded by the Court. The rule there was, that the character of property during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed went further; as to the correctness of which, in its greatest extension, no judgment needed then to be given: but it might safely be affirmed, that the change could not and ought not to be effected by an election of the owner and shipper, made subsequent to the capture, and more especially after a knowledge of the capture is obtained by the owner. Observe the consequences. The capture is made and known. The owner is allowed to deliberate whether it is his intention to remain a subject of his adopted or of his native country. If the capture be made by the former, then he elects to become a subject of that country; if by the latter, then a subject of that. Could such a privileged situation be tolerated by either belligerent? Could any system of law be correct which places an individual, who adheres to one belligerent, and, down to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality, impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, was altogether a novel theory, and seemed, from the course of the argument, to owe its origin to a supposed hardship, to which the contrary doctrine exposes him. But if the reasoning employed on the subject was correct, no such hardship could exist; for if, before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is, therefore, just. The double privilege claimed seems too unreasonable to be granted."

Wheaton, pp. 411–417.

Commercial Domicile.

"In general, the national character of a person, as neutral or enemy, is determined by that of his domicil; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered

liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country.

"The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions."

Wheaton, p. 419.

"As to what species of residence constitutes such a domicil as will render the party liable to reprisals, the text writers are deficient in definitions and details. Their defects are supplied by the precedents furnished by the British prize courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects resident in the enemy's country on the commencement of hostilities."

Wheaton, p. 405.

"In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture of St. Eustatius by Admiral Rodney, delivered in 1785, by Lord Camden, he stated that 'if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence, not attended with these circumstances, ought to be considered as a permanent residence.' In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that 'in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the State under whose protection they lived; and, if war broke out, they, continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt come within that description.'"

Wheaton, p. 405.

Resumption of Native Character.

In the case of the *Indian Chief* [3 C. Rob. 12], "determined in 1800, Mr. Johnson, a citizen of the United States, domiciled in England, had engaged in a mercantile enterprise to the British East Indies, a trade prohibited to British subjects, but allowed to American citizens under the commercial treaty of 1794, between the United States and Great Britain. The vessel came into a British port on its return voyage, and was seized as engaged in illicit trade. Mr. Johnson,

having then left England, was determined not to be a British subject at the time of capture, and restitution was decreed. In delivering his judgment in this case, Sir W. Scott said, 'Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turned his back on the country where he had resided, on his way to his own country, he was in the act of resuming his original character, and must be considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*.'"

Wheaton, p. 407.

Reversion of Native Character.

"The native character easily reverts, and it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country. Thus, the property of a Frenchman who had been residing, and was probably naturalized, in the United States, but who had returned to St. Domingo, and shipped from thence the produce of that island to France, was condemned in the High Court of Admiralty. [*La Virginie*, 5 C. Rob. 99.]

"In *The Indian Chief*, the case of Mr. Dutilth is referred to by the claimant's counsel, as having obtained restitution, though *at the time of sailing* he was resident in the enemy's country; but the decision of the Lords of Appeal, in 1800, is mentioned by Sir C. Robinson, in which different portions of Mr. Dutilth's property were condemned or restored, according to the circumstances of his residence at the time of capture. That decision is more particularly stated by Sir J. Nicholl, at the hearing of the case of the *Harmony* before the Lords, July 7, 1803. 'The case of Mr. Dutilth also illustrates the present. He came to Europe about the end of July, 1793, at the time when there was a great deal of alarm on account of the state of commerce. He went to Holland, then not only in a state of amity, but of alliance with this country; he continued there until the French entered. During the whole time he was there, he was without any establishment; he had no counting-house; he had no contracts nor dealings with contractors there; he employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilth applied to Mr. Adams, the American Minister, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and, having wound up his concerns, came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him, (The *Fair American*, Adm., 1796,) but that part which was taken while he was there

was condemned, and *that* because he was in Holland at the time of the capture.' The *Hannibal and Pomona*, Lords, 1800." [2 Wheat. Appx. 27, 28, 29.]

Wheaton, pp. 407, 408.

Property of Residents in Transferred Territory.

"The *Diana* [5 C. Rob. 60], determined by Sir W. Scott in 1803, is also full of instruction on this subject. During the war which commenced in 1795 between Great Britain and Holland, the colony of Demerara surrendered to the British arms, and by the treaty of Amiens it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their effects acquired before or during the war, in which term they might have the free enjoyment of their property. Previous to the declaration of war against Holland, in 1803, the *Diana* and several other vessels, laden with colonial produce, were captured on a voyage from Demerara to Holland. Immediately after the declaration, and before the expiration of the three years from the notification of the treaty of Amiens, Demerara again surrendered to Great Britain. Claims to the captured property were filed by original British subjects, inhabitants of Demerara, some of whom had settled in the colony while it was in possession of Great Britain; others before that event. The cause came on for hearing after it had again become a British colony.

"Sir W. Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held that those of the first class, by settling in Demerara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power, which presumption, recognized by the treaty, relieved those claimants from the necessity of proving such intention. He thought it reasonable that they should be admitted to their *jus postliminii*, and he held them entitled to the protection of British subjects. But he was clearly of opinion that 'mere recency of establishment would not avail, if the intention of making a permanent residence there was fixed upon the party. The case of Mr. Whitehill fully established this point. He had arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned. Here recency, therefore, would not be sufficient.'

"But the property of those claimants who had settled in Demerara before that colony came into the possession of Great Britain, was condemned. 'Having settled without any faith in British possession, it cannot be supposed,' he said, 'that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty with indifference: and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of remaining there. On the situation of persons settled there previous to the time of British possession, I

feel myself obliged to pronounce, that they must be considered in the same light as persons resident in Amsterdam. It must be understood, however, that if there were among these any who were actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of an intention to remove on the part of those who settled prior to British possession, the presumption not being in their favor.'"

Wheaton, pp. 408–410.

Frustrated Efforts to Resume Native Character.

"The case of the *Ocean* [5 C. Rob. 91], determined in 1804, was a claim relating to British subjects settled in foreign States in time of amity, and taking early measures to withdraw themselves on the breaking out of war. It appeared that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership, and was prevented from removing personally only by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. In this case Sir W. Scott said: 'It would, I think, be going further than the law requires, to conclude this person by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution.'

"In a note to this case, Sir C. Robinson states that the situation of British subjects, wishing to remove from the enemy's country on the event of a war, but prevented by the sudden occurrence of hostilities from taking measures sufficiently early to obtain restitution, formed not unfrequently a case of considerable hardship in the Prize Court. He advises persons so situated, on their actual removal, to make application to government for a special pass, rather than to trust valuable property to the effect of a mere intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution."

Wheaton, p. 410.

United States Court Decisions in War of 1812.

"The same principles, as to the effect of domicil, or commercial inhabitancy in the enemy's country, were adopted by the prize tribunals of the United States, during the late war with Great Britain. The rule was applied to the case of native British subjects,[1] who had emigrated to the United States long before the war, and became naturalized citizens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in question were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the

[1] The *Venus*, 8 Cranch, 277.

enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

"In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicil of the claimants was asserted, the questions of law to be considered were two: *First*, by what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? and, *secondly*, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or that in which he had been naturalized?"

Wheaton, p. 411.

United States Court Decisions in Civil War.

"In the civil war in the United States [1861–1865], property was condemned on the ground of domicil only. It was decided, *first*, that if a place was in the firm possession and under the control of the rebel enemies, it was, for the time, and in the technical sense of the prize law, enemy's territory; *second*, that the property of a person domiciled in that place at the time of capture was liable to condemnation as enemy's property, in the sense of the prize courts; and, *lastly*, that although the owner was a citizen of the United States, and had always resided in that place, which was held to be of right a part of the United States, and of right a proper place of residence to constitute citizenship of the United States, yet the property of such a person was to be condemned without inquiring whether he was or was not, in his intentions or acts, loyal or disloyal. No offer was made, in these cases, to prove an attempt to change domicil, and remove beyond the reach of the enemy's control, before the capture. In short, the rule of international war as to the domicil in the enemy's country was applied to citizens in the civil war. (The Prize Causes, Black's Rep. ii. 635; *Amy Warwick*, Sprague's Decisions, ii.; and Law Reporter, xxiv. 335, 494.) The same rule was applied to the property of foreigners domiciled in such places.

"The general doctrine, that, in a civil war, actual and firm possession, and not the rights or merits of the parties to the war, determines the character of the place for the time being, so far as the commercial relations of neutrals are concerned, was also asserted by the United States in its diplomatic relations with Peru. Opinion of Attorney-General Black, May 15, 1858; Mr. Cass to Mr. Clay, Nov. 26, 1858; Senate Ex. Doc. No. 69, 35th Cong."

Wheaton's Dana note, No. 160, p. 417.

Neutral Property Destroyed on Enemy Vessels.

Although neutral property on enemy vessels may not be captured, it runs the hazard of being destroyed along with the destruction of the enemy merchantman. "Two German vessels, in the late Franco-German war, being taken and burnt the same day, and a prize-court at Bordeaux having decided that the burning of the ships with the neutral goods was authorized, the neutrals interested in the cargo

appealed to the Council of State, for compensation for their property destroyed, and the decision went against them on the following grounds: 1. That though Article III. of the declaration of 1856 gives to a neutral owner a right to the restitution of his goods or the payment of the price, it does not follow that he can claim indemnity on account of acts of injury caused to him by valid capture, or by acts of war connected with such capture. 2. The destruction was due to the fact that the commander of the capturing vessel had so many prisoners on board that he could spare none of his crew for the purpose of taking these prizes into a French port. 3. Hence the burning was a continuation of the fact of war, the fitness of which the owners of the cargo could not be allowed to discuss. To have decided otherwise would have been, remarks M. Calvo, to subordinate the rights of belligerents to those of neutrals, where, in an extreme case, they were in conflict." .

Woolsey, p. 243.

"The nationality of individuals in war depends not on their origin or their naturalization, but upon their domicil. * * * He is an enemy who is domiciled in an enemy's country." * * *

"A person having a house of commerce in the enemy's country, although actually resident in a neutral country, is treated as an enemy so far forth as that part of his business is concerned, or is domiciled there *quo ad hoc*. On the other hand, a person having a house of commerce in a neutral country and domiciled among the enemy, is not held to be a neutral. This is the doctrine of the English courts, adopted by the American. * * *

"In general, property follows the character of its owner. * * * In partnerships, if one owner is a neutral and in a neutral country and the other an enemy, only the property of the latter is liable to capture." * * *

If, however, "a ship sails under a hostile flag, she has, by whomesoever owned, a hostile character," or "if a neutral's ship sails under an enemy's license to trade, she becomes hostile: for why should she have the advantages of a close connection with the enemy without the disadvantages?" or "if a neutral is the owner of soil in a hostile country, the product of such soil, exported by him and captured, is considered hostile. This is on the principle that the owner of soil identifies himself, so far forth, with the interests of the country where his estate lies."

Woolsey, pp. 296–298.

"We now proceed to the rules of international law, in regard to the liability to captures of ships and goods engaged in ordinary trade.

"We may say, in general, that until very recent times two rules have contended with one another,—the rule that *the nationality of property on the sea determines its liability to capture*, or neutral property is safe on the sea and enemy's property may be taken wherever found, and the rule that *the nationality of the vessel determines the liability to capture*, or that the flag covers the cargo. By the first rule the neutral might safely put his goods into any vessel which offered itself, but could not convey the goods of his friend, being one of the belligerents, without the risk of their being taken by the other. By the second, when once the nationality of the ship was ascertained

to be neutral, it went on its way with its goods in safety, but if it belonged to the enemy it exposed neutral goods on board, as well as other, to be taken. This latter rule consists of two parts, that free ships make free goods, and that enemy's ships make goods hostile, but the two are not necessarily, although part of the same principle, connected in practice; the former may be received without the latter.

"It was a thing of secondary importance both for the neutral and for a belligerent, being a naval power, how the rules should shape themselves in regard to the neutral's goods in hostile bottoms. And his own goods on board his own vessel were freely admitted to be safe. Hence justice and a spirit of concession to the neutral united in favor of the rule that *his goods were safe by whatever vessel conveyed;* although not safe from sundry inconveniences growing out of search and the capture of the hostile conveyance.

Enemy Character Acquired by Domicile.

"For belligerent purposes a person may be said to be domiciled in a country when he lives there under circumstances which give rise to a reasonable presumption that he intends to make it his sole or principal place of residence during an unlimited time. The circumstances upon which such a presumption can be founded are the two, which may be united in infinitely varying proportions, of the past duration and the object of residence. If a person goes to a country with the intention of setting up in business he acquires a domicil as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently; if on the other hand he goes for a purpose of a transitory nature, he does not necessarily acquire a domicil, even though he lingers in the country after his immediate object is satisfied; he only does so if at last by the length of his residence he displaces the presumption of merely temporary sojourn which is supplied by his original purpose. Of these two elements of time and object, time is nevertheless the more important ultimately. Lord Stowell said with regard to it that 'of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects, in most cases it is unavoidably conclusive. * * * I cannot but think that against a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case that other purposes forced themselves upon' the person living in a foreign state 'and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself, but if he continues to reside during a good part of the war, contributing by payment of taxes or other means to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there must be. In proof of the efficacy of mere time it is not impertinent to remark that the same quantity of business

which would not fix a domicil in a certain space of time would nevertheless have that effect, if distributed over a larger space of time. Suppose an American came to Europe with six contemporary cargoes of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicil.'

"As domicil is acquired for private purposes of business or pleasure, and the consequences to a man of its possession by him flow, not from an attitude of hostility on his part, but from the accidental circumstance that his conduct is of advantage to a belligerent, he is not tied down to the domicil in which he is found at the beginning of war. So soon as he actually removes elsewhere, or takes steps to effect a removal in good faith and without intention to return, he severs his connexion with the belligerent country. He thus recovers his friendly character, and with it recovers also the rights of a friend. In 1783, for example, a Mr. Johnson, an American subject, came to England to trade, and by staying there till 1797 acquired an English domicil. Some time before the latter year he had formed an intention of leaving, and during its course he actually left. Before his departure however a vessel belonging to him, which he had sent out in order that she should be freighted for America, but which an agent, supposing that Mr. Johnson would have reached the United States before the completion of the voyage, had sent to ports enemy of England and then back to the latter country, was detained there. It was held that as 'the national character of Mr. Johnson as a British merchant was founded on residence only, as it was acquired by residence, and rested on that circumstance alone, he was in the act of resuming his original character, and is to be considered as an American, from the moment he turns his back on the country where he has resided on his way to his own country; the character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*.'

A person though not resident in a country may be so associated with it through having, or being a partner in, a house of trade there, as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory; if he is a merchant in two countries, of which one is neutral and the other belligerent, he is regarded as neutral or belligerent according to the country in which a particular transaction of his commerce has originated. Things are different when a merchant living in a neutral country, and carrying on an ordinary neutral trade has merely a resident agent in the belligerent state, the agent being looked upon as only an instrument for facilitating the conduct of a trade which in other respects is not distinguishable from that of other neutral merchants. If however the trade is in itself such as to create any special

association, through the concession of exceptional privileges or otherwise, between the merchant and the belligerent state, the former becomes impressed with a hostile character relatively to enemies of the state, notwithstanding the fact of his absence. Thus an American, possessing a tobacco monopoly in the Caraccas, but not residing in Spanish territory, and conducting his trade through an agent, was held to have contracted a Spanish mercantile character.

The application of the foregoing rules is not modified in the practice of England and the United States by the fact that a merchant falling under their operation is a consul either for a neutral or a belligerent power. He has the mercantile character of the country in which he is commercially domiciled, and he receives no protection or harm in his private affairs from his official position. If his property is liable to condemnation upon his mercantile character it is condemned; and on the other hand, if he is domiciled in neutral territory, he does not forfeit his neutral character by acting as consul of a belligerent state. The French practice is so far different that the property of a neutral subject, consul for a neutral state in a belligerent country, and carrying on trade in the latter, is held to be itself neutral."

Hall, pp. 517–521.

Conflict Between British and Continental Views as to Test of Enemy Character.

"When cargoes are seized in circumstances that justify the capture of enemy property yet give no right to confiscate the property of neutrals, the question immediately arises whether the owners are to be regarded as enemies if they reside in enemy territory or as neutrals if in addition they possess neutral nationality. Should they be both residents on enemy soil and subjects of the enemy state, no other position than that of enemies can by any possibility be assigned to them. But if residence points in one direction and national character in another, which is to prevail? The answer of the school of thought dominant on the continent of Europe is short and simple. It adheres to nationality as the test. But the English-speaking powers have adopted the opposite view. British and American judges have laboriously built up a great body of law, based upon the proposition that such a residence in an enemy's country as adds the resources of the individual to the common stock of strength for war possessed by the hostile state, stamps the enemy character upon him. They have applied the principles of the law of domicile to questions of maritime capture, and in doing so have modified them to some extent in order to secure substantial justice for all concerned. It would be difficult to deny that they have succeeded in their endeavor, and equally difficult to maintain that the rules they have elaborated are distinguished by the simplicity that characterizes the opposing doctrine. * * *

"The conflict between the two views, which may be called for shortness the British and the Continental, was brought out at the Naval Conference of 1908–1909." There was no difficulty experienced in reaching an agreement on Art. 58, London Naval Conference. "But the division of opinion as to the proper method of determining the character of the owner was so marked and persistent that no decision was possible. The matter was left open, and in all

probability it will be settled in the end by the proposed International Prize Court. A compromise was suggested on the lines of the adoption of nationality as the usual test, and the substitution for it of domicile in the exceptional cases when the owner either had no nationality or was of double nationality, companies to be considered as enemy or neutral according to the locality of their headquarters. This seems reasonable; but it failed to command unanimity, and had to be abandoned in consequence."

A State may regard as enemies persons living in places occupied by the enemy and subject their property, coming from such places, to capture, even though the occupied places "are parts of its own territory. Being under enemy occupation, their possession enriches the enemy for the time being and contributes to his warlike resources, while their own country reaps no advantage from them. They are, therefore, liable, while the occupation lasts, to the severities exercised in war against the property of non-combatant subjects of the enemy state. But if the hostile occupants are dispossessed, the inhabitants are, of course, treated as citizens and not as residents in enemy territory. During the Civil War in the United States the courts regarded places in the firm possession of the Southern Confederacy as enemy territory, and the property of persons domiciled therein as enemy property in so far as the rules of warlike capture were concerned. But it should be remembered that there are British decisions that point to cession or completed conquest, rather than mere occupation in the military sense, as necessary before the territory can be considered hostile to such an extent as to justify the capture and condemnation of property proceeding from it."

"* * * If domicile be taken as the test, the enemy character is possessed in an appreciable degree, as far as property is concerned, *by neutral subjects who have houses of trade in the enemy's country, though they do not reside there.* They are said to have acquired in this way a trade domicile in war which is quite independent of their personal residence, and exposes the goods connected with it to the risk of capture, on the principle that the enemy country has its resources for war increased by the trade done in it, even though the trader himself is a neutral subject and lives in neutral territory. The result was tersely put by Lord Stowell in the case of the *Vigilantia*,[1] when he referred with approval to the rule 'that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he could not protect himself by mere residence in a neutral country.' The liability to capture does not, however, extend to other goods belonging to the same owner but unconnected with the hostile trading establishment."

While the two great tests of enemy character are "citizenship and domicile," there are "other circumstances, such as being temporarily or permanently in the enemy's service, or residing in a district occupied by him, or having a house of trade in his country," that "are taken into consideration and are held to taint the individual concerned to a greater or less degree. According to British and American practice, domicile modifies to a great extent the rules based on nationality. It is necessary, therefore, to inquire what kind of residence amounts in law to domicile, and how far liability to the se-

[1] 1 Rob., 15.

verities of war is affected thereby. Fortunately there are in existence a number of decisions on these points by great prize court judges both in England and in the United States, and we are able to gather from them a body of clear and consistent doctrine. Domicile is determined by the intent of the parties and by the length of their residence. If the intent to go to a certain place and live there is perfectly clear, a domicile therein is acquired as soon as residence commences. If the intent is not clear, long-continued residence will create a domicile; and an intent to make a short stay in a place and then return is held to be overridden by remaining there a long time and treating the place as a home. In every case where a man is a citizen of one country and has his home in another, the liability of his property connected with the latter country to capture and other incidents of warfare is determined by domicile and not by nationality. If the country of his domicile be neutral, he has a neutral character in so far as his property connected with that country is concerned; if it be belligerent, he has a belligerent character which renders his property connected with it enemy property to the other belligerent. But any property which he may possess in the country of his citizenship and allegiance follows the condition of that country as neutral or belligerent. And further, for purposes of capture at sea in time of war, a man may have two or more domiciles, one at least of which is unconnected with actual residence; for he may live in one country and have a house of trade, or a share as partner in a house of trade, in another country, or in several other countries. In such a case goods connected with any house of trade in an enemy country would be regarded as enemy goods, and held liable to capture in circumstances that justify the seizure of such property.

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"In the case of the *Harmony*,[1] the influence of time upon domicile was exhaustively considered in a judgment delivered by Lord Stowell. The vessel was an American merchantman which had been brought in for adjudication by a British cruiser in the war between Great Britain and France at the end of the eighteenth century, on the ground that the cargo consisted of enemy goods. The partners of a house of trade in the United States claimed a portion of it as belonging to them, and therefore neutral property. Restitution was decreed with regard to the share of the partners residing in the United States; but in 1800 Lord Stowell decided against another partner, Mr. G. W. Murray, on the ground that he was residing in France, the country of the enemy. Murray had traveled from the United States to France to look after the business of the firm in that country; but he had remained in France for four years together, and, though it was clear that he intended to return to America, where he had a wife and child, there was also evidence to show that he purposed to come back again to Europe. Upon these facts Lord Stowell laid down that 'a special purpose may lead a man to a country where it shall detain him the whole of his life. Against such a long residence the plea of an original special purpose could not be avowed.' He continued, 'Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not

[1] 2 Rob., 324.

to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes and other means to the strength of the country, he could not plead his special purpose with any effect against the rights of hostility.' These cases clearly show that time and intent are the two great elements in determining domicile.

"In cases of acquired domicile original character easily reverts. In order that it may do so, nothing more is necessary than that the person domiciled abroad should set out on his return journey to his native country, intending to take up his abode there. Thus in 1800, in the case of the *Indian Chief*,[1] Lord Stowell restored the property of Mr. Johnson, a citizen of the United States domiciled in England. It had been captured because it was engaged in a traffic prohibited to British subjects but allowed to neutral American citizens. But on proof that at the time of capture Mr. Johnson had left England on his way to the United States with the intention of remaining there, Lord Stowell decided that he had lost his domicile of choice and regained his domicile of origin. 'The character,' said the judge, 'that is gained by residence ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*.'

"These principles of the British prize tribunals were deliberately adopted by the Supreme Court of the United States in the case of the *Venus*,[2] which arose during the War of 1812–1814 between the two countries. They are indeed the common property of the two great English-speaking powers, though most European nations reject the doctrine of domicile on which they are founded."

Lawrence, pp. 373–379.

Conflict of Views Not Settled by Declaration of London.

"It is * * * generally recognized that the enemy character of goods depends upon the enemy character of their owners. As, however, no universally recognised rules exist as to the enemy character of individuals, there are likewise no universally recognised rules in existence as to the enemy character of goods.

"(1) Since, according to British and American practice, domicile in enemy country makes an individual bear enemy character, all goods belonging to individuals domiciled in enemy country are enemy goods, and all goods belonging to individuals not resident in enemy country are not, as a rule, enemy goods. For this reason, goods belonging to enemy subjects residing in neutral countries do not, but goods belonging to subjects of neutral States residing in enemy country do bear enemy character, although they may be the goods of a foreign consul appointed and residing in enemy country. Further, the goods of such subjects of the belligerents as are domiciled on each other's territory and are allowed to remain there after the outbreak of war, acquire enemy character in the eyes of the belligerent whose subjects they are, but lose their enemy character in the eyes of the belligerent on whose territory they are allowed to remain. Again, the produce of an estate on enemy territory belonging to a

[1] 3 Rob., 20. [2] 8 Cranch, 253.

subject of a neutral State who resides abroad, does bear enemy character, for '*Nothing can be more decided and fixed than the principle * * * that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned * * * whatever the local residence of the owner may be.*' Lastly, all such property of a subject of a neutral State residing abroad but having a house of trade within the enemy country as is concerned in the commercial transactions of such house of trade, likewise bears enemy character, because the owner of these goods has a 'commercial domicile' in enemy country.

"(2) On the other hand, according to French practice, the nationality of the owner of the goods is exclusively the deciding factor, and it does not matter where he resides. Hence only such goods on enemy merchantmen bear enemy character as belong to subjects of the enemy, whether those subjects are residing on enemy or neutral territory; and all such goods on enemy merchantmen as belong to subjects of neutral States do not bear enemy character, whether those subjects reside on neutral or enemy country.

"(3) The Declaration of London does not purport to decide the controversy, since the Powers represented at the Naval Conference of London could not agree. Whereas Holland, Spain, and Japan approved of the British and American practice, Austria-Hungary, Italy, Germany, and Russia sided with France. For this reason, the Declaration, by articles 58 and 59, only enacts that the enemy character of goods on enemy vessels is determined by the enemy character of their owner, and that all goods on enemy vessels are presumed to be enemy goods unless the contrary is proved. But the chief question, namely, what is the factor that decides the enemy character of an owner, is deliberately left unanswered."

Oppenheim, Vol. II, pp. 115–117.

Anglo-American View.

"In France and generally on the European Continent the same character is attributed to a shipowner or cargo-owner for the purpose of maritime capture as for other purposes. He is an enemy or a neutral according to his political nationality. But the French Instructions of 25 July 1870 to naval commanders, Art. 10, say that 'for the application of the principles that the neutral flag covers enemy goods and that neutral goods are free under the enemy flag, contraband of war excepted, the nationality of houses of business [*maisons de commerce*] must be determined according to the place where they are established.' This seems to have been intended to apply to the enemy or neutral character of cargoes only, for the same article proceeds: 'the nationality of ships does not result only from that of their owners, but also from their legitimate right to the flag which covers them,' so that in the case of ships no mention is made of a house of business. So far as it goes, the rule of the Instructions was an innovation no doubt suggested by the Anglo-American doctrine * * * but Despagnet, sec. 651, says that the traditional jurisprudence of the French prize courts has not been modified by it, in support of which statement he quotes *The Joan*, Barboux, p. 104. In that case the court took occasion to reassert the old doctrine in strong terms, but the goods condemned were consigned to two Germans in neutral

territory, *commanditairies of a Hamburg house of business*, so that the Instructions were not violated.

"The Anglo-American system makes the enemy or neutral character of an individual, so far as it is important for the purpose of maritime capture, depend, not on his political nationality, but on his domicile in a peculiar sense known as trade domicile in war. At the same time it upholds the importance of the fact that a house of business is established in the enemy's country. Both these branches of the doctrine are defended on the ground that trade, whether industrial or commercial, is a source of wealth and therefore of strength to the country in which it is carried on, by the money spent there and the liability of the profits to taxation. It is not forgotten that it may also benefit another country in which the person to whom the trade or a share of it belongs is resident, and to which he may cause the profit or his share of it to be brought. And the combination of these points of view has led to a state of the authorities which is thus characterised by Wheaton. 'Residence,' he says, 'in a neutral country will not protect [a merchant's] share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see in this want of reciprocity strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adopted to encourage its naval exertions.'

"Without having or being a partner in a house of business established in a given country, a man may in that country make contracts or do other acts of a trader, not linked together otherwise than through his person. Then we have the state of facts with regard to which Lord Stowell said that 'a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries.[1]' And no greater extent, with regard to the rule now occupying us, can be given to what was said by Lord Lindley: 'The subject of a state at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy. The validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses.[2]'

"What Lord Lindley here contrasts with real domicile is 'trade domicile in war,' and we have to account for the term 'domicile' being used at all in connection with it. In the early times of admiralty law domicile was a familiar conception for the classification of persons, while the conception of nationality has only since been perfected along with that of the modern state. Hence admiralty judges used it as determining the enemy or neutral character of persons before they had any intention of building on the benefit derived to a given country by trade, and we may suppose that in England they were confirmed in that habit by the circumstance that prize causes here were usually assigned to the same persons who were judges in probate and matrimonial matters, in which the reference to

[1] The *Jonge Klassina*, 5 Rob., 302.
[2] Janson *v.* Driefontein Cons. Mines, A. C. 505, 506.

domicile was constant and fundamental. In later times the idea of the trader's place of residence being benefited by his trade came in to strengthen the connection, and has prevented domicile as referred to for war from following the development which domicile in its proper sense has undergone. For the former, as we have seen in the language quoted from Lord Stowell, still freely admits multiplicity as possible, which was the original character of all domicile, its importance in Roman law being limited to questions of jurisdiction and municipal burdens, of which there was no legal objection to a person's being subject to several. But when domicile became a criterion of law, as it now is in England for the age of majority and the intrinsic validity of a will of movable property, it was necessary in civil courts to assert its unity, and along with that necessity there has arisen in England a greater strictness in appreciating the residence necessary for its acquisition. The present English doctrine on that subject is that in order to acquire a domicile of choice in any country a person must intend to reside there in the most permanent manner, or reason must be shown for thinking that he would have formed such an intention if his thoughts had been crystallised by the question being put to him. But the utility to a country of the industry or commerce carried on in it depends on the actual seat of the occupation, and not on its probable continuance.

"Hence our great admiralty judges have not taken a very strict view of the residence necessary for acquiring a trade domicile in war. 'Time,' said Lord Stowell, 'is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects. In most cases it is unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy * * * [Domicile] is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicile.'[1] This doctrine he applied as well to residence in the British dominions as to residence in the enemy country, the effect in the former case being that a trade domicile in British territory brought the merchants having it under the British rule prohibiting trade with the enemy, and thereby exposed their property to capture no less, though for another reason, than if their trade domicile had been in enemy territory. He admitted a relaxation of the doctrine in favour of a person whom the outbreak of war surprises with a trade domicile in a foreign country, when by the date of the capture he has 'put himself in motion, *bona fide*, to quit the country *sine animo revertendi*': then the commencement of his journey is equivalent to his arrival in his own country. But the majority of the Supreme Court of the United States,[2] with the express concurrence of Justice Story though he did not sit in the case, refused to carry the relaxation further, and condemned the property of American citizens who had been caught by the outbreak of war in 1812 with a trade domicile in England, notwithstanding their manifestation, without practical effect, of a desire to return to America.

[1] The *Harmony*, 2 C. Rob., 324. [2] The *Venus*, 8 Cranch, 253.

Chief Justice Marshall dissented, holding that when a merchant establishes himself for trade in a foreign country, his intention is presumably to carry on that trade only so long as he can do so without violating his duty to his own country, which is no longer possible after a war has arisen between the two. 'A continuance of trade after the war, unless perhaps under very special circumstances and for the mere purpose of closing transactions already commenced, would fix the national character and the domicile previously acquired. An immediate discontinuance of trade and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile,' and should exempt the property from condemnation. And Lord Kingsdown must be reckoned as agreeing with the eminent chief justice, for he said, in delivering the judgment of the privy council in *The Gerasimo*, that 'if a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country.'[1]

"The determination of the enemy or neutral character of a house of business by its situation, or of a person by his trade domicile in war, leads to a question about the character of the territory where such situation or domicile exists, as being affected or not by events which have taken place in the course of the war. This was discussed at some length in the case of *The Gerasimo*, with reference to Moldavia, a friendly country which during the Crimean war, was occupied by Russia: Dr. Lushington deemed it to have acquired the enemy character, but he was reversed by the Judicial Committee, the judgment of which was pronounced by Lord Kingsdown. 'What,' they said, 'are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose is it sufficient that the territory in question should be occupied by a hostile force, and subjected during its occupation to the control of the hostile power, so far as such power may think fit to exercise control, or is it necessary that, either by cession or conquest or some other means, it should either permanently or temporarily be incorporated with and form part of the dominions of the invader at the time when the question of national character arises?' The answer must be the same as for the conversion of enemy's territory into friendly or neutral, and, for choosing the second of the alternatives which they put, their lordships had the precedents of the French possessions in the island of St. Domingo, which the lords of appeal in the cases of *The Dart* and *The Happy Couple*,[2] in 1808, treated as still French although the insurgent negroes had established a government in them—the Spanish ports in French occupation during the Peninsular war, which Lord Stowell considered would have to be deemed friendly[3]—and the Ionian Islands, which were held to be still distinct from Russia during the Russian occupation of them before the treaty of Tilsit, but to have become hostile after Russia had delivered them to France in 1807 by a voluntary transaction which was deemed to be equivalent to a cession by treaty. But although an old right to territory will be held to remain in force for the present purpose notwithstanding the temporary loss of its fruition, a new

[1] 11 Moore, P. C. 96. [2] See *The Manilla*, Edw., 3.
[3] The *Santa Anna*, Edw., 182.

right will not for the same purpose change the character of territory till it has been followed by fruition. Spain ceded Louisiana to France in 1796, but France, not having the command of the sea, could not take possession, and a Louisianian ship captured by a British privateer was released as being Spanish and friendly. But the Danish island of Santa Cruz, having fallen under British possession during a war between England and Denmark, was classed by Chief Justice Marshall with 'acquisitions made during war,' so as to have become British 'to every commercial and belligerent purpose' of a war between England and the United States."[1]

Westlake, Vol. II, 163–169.

"ART. 19. The Commander will be justified in treating as an Enemy Vessel:—

"1. Any Vessel under the Flag and Pass of the Enemy Government.[2]

"2. Any Vessel sailing under a License of the Enemy Government.[3]

"3. Any Vessel owned in whole or in part by an Enemy, as hereinafter defined.[4] * * * "

Naval Prize Law, Holland.

"ART. 20. Any person is an Enemy, for the purposes of this Chapter, irrespectively of his Nationality, who resides and carries on trade in the Enemy's Territory."[5]

Naval Prize Law, Holland.

"ART. 21. A place only in temporary occupation by the Enemy is not necessarily to be considered as Enemy's Territory."[6]

Naval Prize Law, Holland.

"ART. 22. Conversely, no person, although of Enemy Nationality, who resides and carries on trade in British, Allied, or Neutral Territory is an Enemy."[7]

Naval Prize Law, Holland.

"ART. 23. The place where a person resides and trades is sometimes described as that of his 'Commercial Domicil.'"[8]

Naval Prize Law, Holland.

"ART. 24. Trading in a country, without residence there, may confer a 'Commercial Domicil' in that country."[9]

Naval Prize Law, Holland.

"ART. 25. So also may residence in the Enemy's Territory on the part of a person engaged in trade in a Neutral country."[10]

Naval Prize Law, Holland.

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[1] 9 Cranch, 191.

[2] "*Vigilantia*, 1 C. Rob. 1. *Vrouw Elizabeth*, 5 C. Rob. 2. *Vrouw Anna Catharina*, 5 C. Rob. 161. *Fortuna*, 1 Dod. 81. *Success*, 1 Dod. 131. *Industrie*, Spinks, 54.

[3] *Julia*, 8 Cranch, 181. *Aurora*, 8 Cranch, 202. *Hiram*, 8 Cranch, 444.

[4] *Primus*, Spinks, 48. *Industrie*, Spinks, 56.

[5] "*Indian Chief*, 3 C. Rob. 12. *Ann*, 1 Dods. 221. *Joanna Emilie*, Spinks, 12. *Abo*, Spinks, 42."

[6] "*Santa Anna*, Edwards, 180. *Gerasimo*, 11 Moore P. C. 88."

[7] "*Danous*, 4 C. Rob. 255 *n*. *Postilion*, Hay and Marriott, 245."

[8] "Sometimes also as that of his 'National Mercantile Character.' *Baltica*, Spinks, 264; where see Dr. Lushington's remarks upon the confusion which results from applying to these cases the rules as to Domicil, properly so called. See also Note III, in the Appendix to Professor Dicey's treatise on Domicil."

[9] "*Jonge Klassina*, 5 C. Rob. 297. *S. Jose Indiano*, 1 Wheat. 208."

[10] "*S. Jose Indiano*, 1 Wheat. 208."

"ART. 26. A person may have different Commercial Domicils, according to the course of different transactions."[1]

Naval Prize Law, Holland.

"ART. 27. The Commercial Domicil of a Consul who trades is in the place of his Trade, not in the country which he represents."[2]

Naval Prize Law, Holland.

"ART. 28. The Commercial Domicil of European traders in the East is that of the factory or association under whose protection they carry on their trade."[3]

Naval Prize Law, Holland.

"ART. 29. A Commercial Domicil is retained till another is *bonâ fide* acquired, but is more readily changed than a domicil properly so called."[4]

Naval Prize Law, Holland.

"ART. 30. A person engaged in Enemy navigation is also an Enemy, for the purposes of this Chapter, not only in respect of the particular Vessel in which he is employed, but also in respect of other Vessels belonging to him that have no distinct national character impressed upon them."[5]

Naval Prize Law, Holland.

"ART. 31. The Commercial Domicil of the Owner of a Vessel will be ascertained from her Papers—e. g., her Register (if any), or the Builder's Contract, if the Vessel is a new one; or the Bill of Sale, if the Vessel has been lately transferred; or from inquiry from the Master, who is bound to be acquainted with the name and Commercial Domicil of the Owner."

Naval Prize Law, Holland.

"ART. 40. The Commander will be justified in treating as a British Vessel—

"1. Any Vessel sailing under a British Flag and Pass.

"2. Any Vessel carrying a Certificate of British Registry.

"3. Any Vessel owned by a British Subject, as hereinafter defined (*see* secs. 41, 42).

"4. Any Vessel apparently owned by a person having a Neutral Commercial Domicil, if such person has acquired the ownership by a Transfer from a British subject made after the Vessel had started upon the voyage during which she is met with, and has not yet actually taken possession of her.

"5. Any Vessel apparently owned by a person having a Neutral Commercial Domicil, if such person has acquired the ownership by a Transfer from a British subject made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the Transfer was *bona fide* and complete."[6]

Naval Prize Law, Holland.

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[1] "*Two Brothers*, 1 C. Rob. 132."
[2] "*Indian Chief*, 3 C. Rob. 27. *Baltica*, Spinks, 264."
[3] "*Indian Chief*, 3 C. Rob. 29."
[4] "" *Ernst Merck*, Spinks, 102."
[5] "*Vriendschap*, 5 C. Rob. 166. *Soglassie*, Spinks, 104."
[6] "*Odin*, 1 C. Rob. 250. For the precautions to be observed in ascertaining that an alleged Transfer was *bona fide* and complete, *v. supra*, sec. 19 (5), pp. 7–9."

"ART. 41. Any person is a British subject, for the purposes of this Chapter, irrespectively of his Nationality, whose 'Commercial Domicil' is British."

Naval Prize Law, Holland.

"ART. 42. A 'British Commercial Domicil' is ascertainable upon the principles already laid down with reference to an 'Enemy Commercial Domicil,' *supra*, Chapter III, secs. 20–30."

Naval Prize Law, Holland.

"ART. 43. The Commercial Domicil of the Owner of a Vessel will be ascertained from her Papers—e. g., her Register (if any); or the Builder's Contract, if the Vessel is a new Vessel; or the Bill of Sale, if the Vessel has been lately transferred; or from inquiry from the Master, who is bound to be acquainted with the name and domicil of the Owner."

Naval Prize Law, Holland.

"10. Ships of war and merchant vessels of the enemy are subject to condemnation as prizes, as well as all articles on board, except—

"(1) Such as are intended for the private use of the crew or passengers; and

"(2) Such as belong to the Government of a neutral Power or to its subjects, and do not constitute contraband of war. Nevertheless, the Imperial Government reserves the right to permit, on the basis of reciprocity, the exemption from condemnation of all, or of a particular class of, hostile vessels and cargoes, excepting, however, cases where such vessels or cargoes are liable to condemnation on the grounds indicated in Articles 11 and 12 for neutral vessels."

Russian Prize Regulations, 1895.

"ART. 3. A person's nationality is taken to be that of the country in which he is at the time domiciled, whatever his registered nationality may be.

"ART. 4. By domicile is meant the place where a person resides permanently. In the case of a merchant, however, his domicile is where he has his chief place of business, and in the case of a merchant Consul his domicile is where he conducts his business.

"ART. 5. A locality temporarily in the possession of the enemy shall not, so far as the nationality of individuals, shipping, or cargo is concerned, be considered enemy territory."

Japanese Regulation, 1904.

"ART. 8. The nationality of cargo is determined by the nationality of its owner.

"ART. 9. The cargo enumerated below shall, notwithstanding the provisions of the preceding clause, be held in all cases to be enemy cargo:—

"1. Cargo which has been despatched, either before the war began in anticipation of hostilities breaking out, or while the war is in actual progress, by a person domiciled in Japan or in a neutral country, or by some one deputed by him to do so, to the hostile State, to individuals of that nation, or to a person deputed by the enemy to receive it.

"2. Cargo, the ownership of which has been transferred, either before the war began in anticipation of hostilities breaking out, or while the war is in actual progress, by the hostile State, or by individuals of that nation, to a person domiciled in Japan or in a neutral country, there being no proof that the transfer of ownership was *bonâ fide* and complete.

"When a transfer of ownership of cargo takes place while the ship carrying the cargo is on her voyage, and actual delivery has not yet taken place, the transfer shall be held to be not *bonâ fide* and complete."

Japanese Regulations, 1904.

"18. The following portions of her cargo are subject to confiscation:—

(a) The Enemy's property.

(b) The merchandise belonging to the captain and the owner, when the ship was captured against resistance. (See 16 (b).)

(c) Contraband and the merchandise belonging to its owner, according to Section III.

(d) In case of breach of blockade the confiscable merchandise according to 80.

"19. Those portions of the cargo are subject to seizure also, when the captain refrains from bringing in an enemy ship, so far as they are not without question proved to be neutral goods."

German Prize Rules, 1909.

"20. * * *

(b) The character of the goods found on board an enemy ship as neutral or enemy goods, is determined by the nationality of the owner. If he have no, or as much neutral as hostile nationality, the character of the goods is determined by the domicile of the owner. Goods which belong to a stock corporation will be regarded as enemy's or neutral according as the corporation has its headquarters in a hostile or neutral country.

"The proof whose property portions of the cargo are and whether they are neutral goods will in general hardly be determinable on board."

German Prize Rules, 1909.

"27. * * * The neutral or enemy character of goods found on board an enemy ship is determined by the nationality of their owner. * * *.

French Naval Regulations, 1912.

Article 58 of the Declaration of London substantially appears as Art. 45 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Domicile, as Affecting National Character.

"'According to Chancellor Kent, the principle that 'for all commercial purposes the domicil of the party, without reference to the place of birth, becomes the test of national character, has been repeatedly and explicitly admitted in the courts of the United States.' 'If he resides' (here "domicil" and "residence" are treated as convertible by Chancellor Kent, which, if the latter term be regarded

as defining the rule, would largely extend belligerent rights) 'in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade.' (1 Kent Com. 75; The *Chester*, 2 Dall. 41; Maley *v.* Shattuck, 3 Cranch, 458; The *Venus*, 8 id. 253. To the same effect, see The *William Bagaley*, 5 Wall. 377; The *Cheshire*, 3 Wall, 231.) Sir Robert Phillimore, on the other hand, evidently accepts this position with reluctance (4 Phill. 169), though it is reaffirmed by Mr. Dicey, who states the distinction to be as follows: 'A commercial domicil is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there.' (Dicey on Domicil, 345; see further Whart. Confl. of Laws, sec. 70.) This is clearly put; and if we accept the position that an enemy's goods may be seized at sea wherever found, gives us at least a line of demarkation readily understood and easily applied. It is, however, to be regretted that the term "domicil" should be adapted to conditions so different as residence with intention to establish a permanent home, and residence with intention to engage in business. The rejection of this distinction renders still more objectionable the claim of belligerents to seize an enemy's goods at sea. If by an 'enemy' is to be considered any one who by his business contributes to the resources of an enemy's country, it would be hard for any goods on the high seas, in any way related to a belligerent country, to escape the meshes of the net of the other belligerent. And even were we to hold that a commercial 'domicil' of this kind stamps the party accepting it with the political character of the country in which he does business, the more reasonable view is that if he engage in such business in time of peace, this 'domicil,' if not adopted as final, ceases when the sovereign of such country enters into a war which could not have been contemplated by the party when he engaged in the business. This is the position taken by Marshall, C. J., in The *Venus* (8 Cranch, 253), dissenting in this respect from the majority of the court, who held to the English view. Chancellor Kent (Com. i. 79) and Mr. Duer (Ins. i. 498), vindicate the dissenting opinion of the Chief Justice; Chancellor Kent saying 'there is no doubt of its superior solidity and justice.' And even by the English courts a person doing business in a land in which he is not naturalized is allowed, on the breaking out of war, a reasonable time to leave such land, and dissolve his business relations. The *Gerasimo*, 11 Moore, P. C. 88; The *Ariel*, id. 119; see, for parallel cases in this country, The *William Bagaley*, 5 Wall. 377; The *Gray Jacket*, 5 Wall. 342. But where a merchant elects to put his goods in a country engaged in war, he impresses such goods, according to the English view, with the political character of such country; and this

allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country.' Wharton, Int. Law Digest, III, 344."

Moore's Digest, vol. 7, pp. 428, 429.

"The domicil of a merchant, and not his natural allegiance, determines the neutral or unneutral character of his trade. Chester *v.* Experiment, Federal Court of Appeals (1787), 2 Dall. 41. See, also, The *Harmony* (1800), 2 C. Rob. 322; The *Herman*, 4 C. Rob. 228; *Jonge Klassina*, 5 C. Rob. 302; Wilson *v.* Marryat, 8 T. R. 45; Bell *v.* Reid, 1 Maul. & Selw. 726; The *Abo*, 1 Spinks, 349; The *Gerasimo*, 11 Moo. P. C. 88; The *Baltica*, id. 141."

Moore's Digest, vol. 7, p. 424.

"Where a naturalized citizen of the United States, of British origin, was, on the declaration of war by the United States against Great Britain, domiciled within the dominions of the latter power, it was held that his property, shipped from England after the declaration of war, but before the declaration was known there, was subject to capture and condemnation as enemy's property. The *Venus* (1814), 8 Cranch, 253. Marshall, C. J., dissented, and his dissent is approved by Chancellor Kent (1 Com. 79), and by Mr. Duer (1 Duer on Insurance, 496–498)."

Moore's Digest, vol. 7, p. 425.

"The share of a partner in a neutral house is, jure belli, subject to confiscation where his own domicil is in a hostile country. The *Antonia Johanna* (1816), 1 Wheat. 159. See The *Jonge Classina*, 5 C. Rob. 302; The *Anna Catherina*, 4 C. Rob. 119; The *Portland*, 3 C. Rob. 44; Calvo, sec. 1719—cited in Hall, Int. Law, 5th ed. 501."

Moore's Digest, vol. 7, p. 432.

"All persons, whether foreigners or not, residing within the territory occupied by the hostile party in the civil war in the United States, are liable to be treated as enemies. The Prize Cases, 2 Black 635; The *Venice*, 2 Wall. 258; The *William Bagaley*, 5 Wall. 377; The *Gray Jacket*, 5 Wall, 342; The *Pioneer*, Blatchf. Prize Cas. 61; The *Prince Leopold*, id. 89; The Lilla, 2 Sprague, 177."

Moore's Digest, vol. 7, p. 427.

"There is no legal difference, as to a plea of alien enemy, between a corporation and an individual. Society, etc., *v.* Wheeler, 2 Gall. 105. See, also, The *Danckebaar Africaan*, 1 Rob. 107; Martine *v.* Int. Life Ins. Soc., 53 N. Y. 339. See Nigel Gold Mining Co., Lim., *v.* Hoade (1901), 17 T. L. R. 711, and the comments thereon in 15 Harvard Law Review, 237."

Moore's Digest, vol. 7, p. 434.

"A ship and cargo, captured as British, were claimed by a Russian as neutral. It appeared that the ship, documented as Russian, was placed under the control of a British house, which dispatched her to Havana, where she was loaded under the directions of one M.,

ostensible agent of the Russian owner; and that she then cleared apparently for a Russian port, but with orders to call at a British port, and terminate her voyage there under the orders of the British house. Evidence was lacking to show either the relations between the Russian owner and the British house, or the dependence of M. on the Russian owner for authority, instructions, and resources. All the material papers touching the transaction were concealed in a billet of wood, and their presence was betrayed by one of the crew. They tended to show that the adventure was undertaken by the British house alone; that the cargo was purchased with their funds, and that M. was their agent. As to the ship, nothing was produced to show her neutral character but the formal papers that always accompany fictitious as well as real transactions. There was no charter-party, no original correspondence, no instructions, even, directing the master to obey the orders of the British house. Held, that both ship and cargo should be condemned, the court (Johnson, J., delivering the opinion) saying that in any case a neutral shipowner's lending his name to cover a fraud with regard to the cargo would alone subject the ship to condemnation. The *Fortuna* (Feb. 26, 1818), 3 Wheaton, 236. The court referred to the case of the *St. Nicholas*, 1 Wheaton, 417, as similar in circumstances."

Moore's Digest, vol. 7, pp. 400, 401.

"A merchant having a fixed residence, and carrying on business at the place of his birth, does not acquire a foreign commercial character by occasional visits to a foreign country. The *Vereide*, 9 Cranch, 388."

Moore's Digest, vol. 7, p. 426.

"A Frenchman who had resided thirteen years in Mexico was held to have acquired a domicil in the enemy's country, subjecting him, so far as his property was concerned, to all the disabilities of an alien enemy. Rogers *v.* The *Amado*, 1 Newb. Adm. 400."

Moore's Digest, vol. 7, p. 427.

"Property left in a hostile country by an owner who, abandoning such country, returns to his proper allegiance, becomes, unless a prompt effort is made to remove it, impressed with a hostile character, and is liable to the consequences attaching to enemy's property. The *William Bagaley*, 5 Wall. 377."

Moore's Digest, vol. 7, p. 427.

"The court reaffirms the ruling in the *William Bagaley* (5 Wall. 377), that a resident of a section in rebellion should leave it as soon as practicable and adhere to the regular established government; and furthermore holds that one who, abandoning his home, enters the military lines of the enemy and is in sympathy and cooperation with those who strive by armed force to overthrow the Union, is, during his stay there, an enemy of the Government, and liable to be treated as such, both as to his person and property. Gates *v.* Goodloe, 101 U. S. 612."

Moore's Digest, vol. 7, p. 427.

"If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize,

notwithstanding some of them have a neutral residence. But such connection will not affect the other separate property of the partners having a neutral residence. The *San Jose Indiano*, 2 Gall. 268."

Moore's Digest, vol. 7, p. 432.

"The presumption of the law of nations is against an owner who suffers his property to continue in the hostile country for a considerable length of time. If a person, abandoning a hostile country, has had his property in partnership with citizens thereof, it is his duty to withdraw or dispose of his interest in the firm. If he neglects to do so, his property becomes liable as enemy's property. The *William Bagaley*, 5 Wall. 377.

"The taint of belligerent domicil does not reach the separate property of a partner having a neutral domicil, see the *Sally Magee*, Blatch. Pr. Cas. 382; The *Aigburth*, id. 635."

Moore's Digest, vol. 7, p. 433.

"A neutral, who has resided in an enemy's country, resumes his neutral rights as soon as he puts himself and his family in itinere to return home to reside, and has a right to take with him money he has earned, as the means of support for himself and his family. Such property, it was further held, is not forfeited by a breach of blockade by the vessel on board of which he has taken passage if he personally is in no fault. United States *v.* Guillem, 11 How. 47."

Moore's Digest, vol. 7, p. 433, 434.

"Some goods, captured by an American privateer and libelled as British property, were claimed by A, an American merchant. The original order for the goods did not appear, but the evidence contained (1) an invoice, (2) a bill of lading, and (3) two letters. The invoice stated that the goods were bought by B, a merchant of Birmingham, 'by order and for account and risk' of A, and forwarded on March 4, 1811, to the care of certain merchants at Liverpool, and that they were 'the property' of C, a banker of Birmingham, to whom the amount of the invoice was to be remitted. The bill of lading, which was in the usual form, stated that the goods were shipped by the Liverpool merchants to be delivered to A, or his assigns, in New York. The letters in question were both addressed to A, and were dated, respectively, at Birmingham, July 8 and July 9, 1812. The first was from B, and stated that, in consequence of the revocation of the orders in council, he had lost no time 'in shipping the goods sent to Liverpool so long since, agreeable to your (A's) kind order.' The second letter, which was referred to in the first, was from C, who stated that he had extended assistance to B, who had been embarrassed, and that he had therefore obtained from the latter 'an assignment of certain quantities of goods' which B 'had provided on account of A * * * previous to the 2nd of February, 1811.' Marshall, C. J., delivering the opinion of the court, said that, in the usual course of trade, if the purchasing and shipping merchant were the same, there would rarely be any actual change of property between the purchase and the shipment. But, in the state of the relations between the United States and Great Britain during the existence of the nonimportation acts, the transaction often became divided. Goods were procured under a general

order to purchase, but were not to be shipped till a future uncertain event should occur; and if they were, in the meantime, to remain the property of the agent, they would probably be retained at the place of purchase under his immediate control and inspection. Their conveyance to a seaport, there to be stored till their importation into the United States should be allowed, would indicate an actual investment of the property in the person by whose order and for whose use the goods were purchased and stored. The evidence in the present case indicated that the goods when stored in Liverpool were the property of A, subject to that control which B would have as purchaser and intended shipper, who had advanced the purchase money. This control, while affording security to B, could not be wantonly used to the destruction of A's property in the goods, and, in the case of a conveyance to a person having notice of A's rights, should be construed to operate consistently with them, so far as the two rights could consist with each other. The words in the invoice representing the goods as the property of C evidently were introduced merely for the purpose of securing the payment of the purchase money to him. On the whole, the majority of the court was of opinion that the goods were shipped in pursuance of A's orders, and became his property when delivered, for his use, to the master of the vessel, 'if not at an earlier period,' i. e. 'on being stored in Liverpool, if not at an antecedent time.' The goods must, therefore, be restored. The *Susan & Mary* (1816), 1 Wheaton, 25."

Moore's Digest, vol. 7, pp. 339, 400.

Possession by Enemy Not Always Conclusive of Ship's Character.

"The circumstance that a ship is found in the possession of the enemy affords prima facie evidence that it is his property. But if it was originally of a friendly or neutral character, and has not been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual, it will be restored absolutely or conditionally, as each case requires. Schooner *Adeline*, 9 Cranch, 244."

Moore's Digest, vol. 7, p. 399.

"The liability of property, the product of an enemy country, and coming from it during war, to capture, being irrespective of the status domicilii, guilt or innocence of the owner, such property is as much liable to capture when belonging to a loyal citizen of the country of the captors as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of this rule is that where, upon the breaking out of hostilities or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it. The *Gray Jacket*, 5 Wall. 342."

Moore's Digest, vol. 7, p. 402.

"Ships in time of war are bound by the character impressed upon them by the government from which their documents issue and under whose flag and pass they sail.

"The share of a citizen in a ship sailing under an enemy's flag and papers, there having been ample time and opportunity to dispose of the same, but no attempt made to do so, is subject to capture and condemnation equally with the shares of enemies in the same ship. And where the cargo and ship are owned by the same person the cargo follows the fate of the ship. The *William Bagaley*, 5 Wall. 377."

Moore's Digest, vol. 7, p. 402.

"The *Carlos F. Roses*, a Spanish bark, was condemned as enemy's property, but a question was raised as to the enemy or neutral character of the cargo. This depended chiefly on the effect of the indorsement of the bills of lading to neutrals. The cargo was claimed by Kleinwort Sons & Co., British merchants of London. It consisted of jerked beef and garlic, and was shipped at Montevideo in March, 1898, by Gibernau & Co., merchants of that place, but citizens of the Argentine Republic. The invoices stated that the goods were shipped 'to order for account and risk and by order of the parties noted below.' In the invoice of jerked beef the consignees noted below were 'the expedition or voyage of the *Carlos F. Roses*' and 'Mr. Pedro Pagés, of Havana,' all concerned being Spanish subjects; the consignees of the garlic were 'Mr. Pedro Pagés' and 'the undersigned,' Gibernau & Co. There were three sets of bills of lading issued by the master to Gibernau & Co., one for that part of the shipment of jerked beef made for account of the vessel, another for that part made for account of Pagés, and the third for the shipment of garlic for the joint account of Pagés and Gibernau & Co. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. In the ship's manifest the destination of the cargo was stated thus: 'Shipped by Pla Gibernau Co. To order.' The visé of the Spanish consul read: 'Good for Havana, with a cargo of jerked beef and garlic.' There was no charter party. On the face of the papers the court held that the goods, when delivered to the vessel, became the property of the consignees named in the invoices, and that, as Gibernau & Co. had not appeared and claimed any interest, the whole cargo, which the claimants in fact admitted to be 'ultimately destined for Don Pedro Pagés, of Havana,' must be condemned as enemy property unless cause to the contrary was shown. Such cause Kleinwort & Co. endeavored to establish, on the ground that after the shipment of the cargo they made advances upon it to the amount of about $30.000, in consideration of which the bills of lading, indorsed in blank by Gibernau & Co., were delivered to them with the intent that they should take title to the bills and the cargo, and on the arrival of the latter at its destination hold it as security, with the right to dispose of it and reimburse themselves with the proceeds. They contended that in this way they became the lawful owners both of the bills and of the cargo. It appeared, however, that in neither of the two bills of exchange, which were drawn on Kleinwort & Co. for the amount of the advances, was any reference made to the cargo, and that while two of the bills of lading were alleged to have been delivered to the firm at the time of its acceptance of the bills of exchange, the third, for the greater part of the jerked beef, was not delivered till long afterwards. On these and other circumstances the court held that the cargo never bona fide passed to Kleinwort &

Co., but remained the property of Spanish subjects, and was liable to condemnation. The *Carlos F. Roses*, 177 U. S. 655."

Moore's Digest, vol. 7, pp. 403, 404.

In Cleveland *v.* Walvart (Mass. S. C., 1778) (7 Dane's Abridgment, Ch. 227, Par. 14, p. 649) the court decided that goods shipped in an enemy's country are to be deemed enemy's goods until the contrary is proved.

In the *Packet de Bilboa* (1709) (2 C. Rob. 133) Sir William Scott said that while in time of peace it is perfectly legal to enter into a contract whereby goods are shipped entirely at the risk of the consignor, "in time of war this cannot be permitted; for it would at once put an end to all captures at sea. The risk would, in all cases, be laid on the consignor where it suited the purpose of protection. On every contemplation of a war this contrivance would be practiced in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture. It is, therefore, considered to be an invalid contract in time of war, or, to express it more accurately, it is a contract which, if made in war, has this effect—that the captor has a right to seize it, and convert the property to his own use; for he, having all the rights that belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy, and the shipper who put it on board, during a time of war must be presumed to know the rule, and to secure himself, in his agreement with the consignee, against the contingence of any loss to himself that can arise from capture."

The *Harmony* (1800) (2 C. Rob. 322, Scott, 585) involved the capture of a cargo of alleged enemy goods owned by A who, although a resident of France engaged in trade, was an American citizen. He had resided in France for about six years prior to the capture, having been an agent of a New York house. The question to be decided was whether A's residence was of such a character as to fix on him the liability of an enemy in respect to his trade.

Sir William Scott in delivering the judgment said:—"Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may*, *probably*, or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose.

"A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit, it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach though the fact may be true,) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a

case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided.

"Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

"In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicil in a certain space of time, would nevertheless have that effect, if distributed over a large space of time. Suppose an American comes to Europe, with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that, of the same American coming to any particular country of Europe, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil."

In the *Indian Chief*[1] (1801) (3 C. Rob. 12, Scott, 588) the court considered the question of what constituted residence on the part of a neutral so as to permit of the condemnation of a vessel claimed by him as being engaged in enemy trade.

It was said that taking it to be clear that the national character of the owner of the cargo "as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone: it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American: The character that is gained by residence ceases by residence: It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*. The courts that have to apply this principle, have applied it both ways, unfavorably in some cases, and favorably in others. This man had actually quitted the country. Stronger was the case of Mr. Curtissos (The *Snelle Zeylder*, Lds. Ap., 25, 1783); he was a British-born subject, that had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country; but he had got no farther than Holland, the mother country of those

[1] "The cargo of this vessel belonged to Mr. Miller, resident in Calcutta as American consul. He was held to be a British merchant engaged in trade with the enemy, and his goods were therefore condemned as *droits* of admiralty, being seized in a British port. His consular character made no difference whatever in protecting his trade."—Editorial note on above case, Scott, p. 591.

settlements, when the war broke out. It was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character: and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in actual pursuit of his American character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally, nor colorably, for the mere purpose of the present claim: and therefore I shall restore the ship.'"

In the *Anna Catharina* (1802) (4 C. Rob. 107), Sir Willim Scott refers to the rule that goods going to an enemy to become his property on arrival are liable to condemnation, as being "a rule universally applied by this court, and confirmed by the authority of the Supreme Court. A distinction has indeed been admitted, in favor of contracts made before a war, and without any contemplation of war; but if the contract being made before the war, and without any prospect thereto, is carried into execution by a shipment after the breaking out of hostilities, the ground on which that favorable distinction is made, no longer exists. The original contract in this case was, as I have observed, originally in offensive, both parties being enemies. But, on the principle before adverted to, if a party becomes a neutral after the contract, and before the execution of it, and shipment takes place afterwards, that also will compose a case not falling within the reach of the relaxation."

In the case of *The Phoenix* (1803) (5 C. Rob. 20), Sir William Scott says: "Nothing can be more decided and fixed, as the principle of this court and of the supreme court, upon very solemn argument, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior court, that it is no longer open to discussion. No question can be made on the point of law at this day."

In the *Vrow Anna Catharina* (1804) (5 C. Rob. 161), Sir William Scott said: "It can not be doubted * * * indeed that there are transactions so radically and fundamentally national, as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation, in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil and is to be taken as part of that country, in that particular transaction, independent of his own personal residence and occupation."

The case of the *Ann Green* (1812) (1 Gall. 274, 1 Fed. Cases No. 414) involved the determination of the question of the domicile in an enemy country of Mr. Cullen, an American citizen. It was held that a temporary residence in time of peace for the greater part of four years did not of itself create an enemy domicile.

Mr. Justice Story in this case said: "Upon a residence * * * for temporary purposes, there may be engrafted all the effects of permanent settlement, if it be continued for a great length of time,

and be attended with conduct, which demonstrates that new views and new connections have supervened upon the original purposes; but, on the other hand, mere length of time can not of itself be decisive, where the purpose is clearly proved to have been temporary, and still continues so, without any enlargement of views; and even the shortest residence, if with a design of permanent settlement, stamps the party with the national character. The *Indian Chief*, 3 C. Rob. Adm. 12; The *Diana*, 5 C. Rob. Adm. 60; The *Boedes Lust*, 5 C. Rob. Adm. 233. The question, after all, results in an inquiry into the intention and conduct of the party; and it is extremely difficult to lay down any general rule upon the subject. If Mr. Cullen were domiciled at Jamaica, at the time of the shipment, he would be liable to all the consequences of a British commercial character; for no principle is better settled, than that the property of a person settled in the enemy's country, although he be a neutral subject, is affected with the hostile character. It is quite immaterial in this view, what was the original or acquired allegiance of Mr. Cullen. A native American citizen is just as much within the scope of the principle as a foreigner. In examining the testimony, however, I think it is difficult to resist the impression, that Mr. Cullen's absence was originally for temporary purposes. It is expressly shown, that he went out to collect the debts of the company, and there is no part of the evidence that points to a distinct trade disconnected with those debts. I admit that his connection in a house of trade in New York would not alone protect him; for he may at the same time possess the commercial character of several nations. The *Jonge Klassina*, 5 C. Rob. Adm. 297, and *The Vriendschap*, 4 C. Rob. Adm. 166, are full to this point. But when his original purposes are shown to be temporary, and the whole transaction was in a time of peace, I do not think the presumption from length of time so forcible.

"It is said, that Mr. Cullen was originally a British subject, and that native allegiance easily returns; and *La Virginie*, 5 C. Rob. Adm. 98, is cited in support of the position. Without pretending to be satisfied with that decision, which with all possible respect for the learned judge, I must say upon the evidence furnished in the report, was rather strained, I accede to the doctrine, that fewer circumstances are necessary to constitute domicil in case of native subjects, than of foreigners; and that as native allegiance easily reverts, so the presumption against the party is much heightened by the shipment being made from a port of his native country. Still, however, it is but a presumption, and if clearly done away, I do not think that a single principle is overturned by a disregard of that circumstance."

The *Joseph* (1813) (1 Gall., 545, 13 Fed. Cases No. 7533, affirmed 8 Cranch, 451), Mr. Justice Story said: "It has been suggested, that the cargo being shipped by a neutral house in St. Petersburg, consigned to German houses in London, the latter are to be considered as neutral, and therefore there was no trade at all with the enemy. There is certainly no foundation for this suggestion. Admitting that the German houses in London consisted altogether of German partners, it is quite impossible to contend that they are neutrals. It is not the birth or native allegiance, but the domicile, that decides, in cases of this nature, the national character of the

parties. See Curt. Dig. tit. 'National Character,' where all the authorities may be found. If a neutral subject be domiciled, and carry on trade in an enemy's country, he is held, as to all commercial purposes, an enemy. There can be no doubt, therefore, that the German houses in London were, as to all purposes of trade, enemies, and their property liable to confiscation as hostile property."

"A Spanish subject, who comes to the United States in time of peace to carry on trade, and remains here engaged in trade after a war has been begun between Spain and Great Britain, is to be deemed an American merchant by the law of domicil, although by the law of Spain the trade in which he was engaged could be carried on only by a Spanish subject; his neutral character depending, not on the kind of trade in which he was engaged, but on his domicil. Livingston *v.* Maryland Ins. Co. (1813), 7 Cranch, 506. See, also, the *Pizarro* (1817), 2 Wheat. 227."

Moore's Digest, vol. 7, p. 425.

In the case of the *Rapid* (1814) (8 Cranch, 155), an American citizen had "a long time" prior to the outbreak of the war of 1812 between the United States and Great Britain, purchased certain goods in England, and had them conveyed to a small island off the coast of Nova Scotia. Upon the outbreak of the war, the owner chartered an American vessel to proceed from Boston to the island for the purpose of bringing the goods into the United States. On the return trip, the vessel and cargo were captured by an American privateer and condemned as good prize (1 Gall., 295). An appeal was taken to the Supreme Court where the decision of the lower court was affirmed.

The Supreme Court considered the points made in behalf of the claimant in the following language: "1. Whether this was a trading, in the eye of the prize law, such as will subject the property to capture? The force of the argument on this point, depends upon the terms made use of. If, by trading, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connection with the offence. Intercourse, inconsistent with actual hostility, is the offence against which the operation of the rule is directed: and by substituting this definition for that of trading with a enemy, an answer is given to this argument.

"2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimant certainly had not a right to leave the United States, for the purpose of bringing home his property from an enemy country; much less could he claim it as a right, to bring into this country goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known, that the forfeiture

was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American chargé d'affaires in England. But this claimant could allege no such excuse.

"3. On the third point, we are of opinion, that the foregoing observations furnish a sufficient answer. If the right to capture property thus offending, grows out of the state of war, it is enough to support the condemnation in this case, that the act of congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume the belligerent character. Such character we are of opinion this vessel and cargo took upon herself; or, at least, she is deprived of the right to prove herself otherwise."

The *Venus* (1814) (8 Cranch, 253): The Court said: "The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruizer, ought to be condemned as lawful prize. It is contended by the captors, that as these claimants had gained a domicil in Great Britain, and continued to enjoy it, up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it is then insisted, that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there resettled themselves, they became reintegrated British subjects, and ought to be considered by this court in the same light as if they had never emigrated. On the other side, it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States; and that, until such election was, *bonâ fide*, made, the courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

"There being no dispute as to the facts upon which the domicil of these claimants is asserted, the questions of law alone remain to be considered. They are two: 1st. By what means and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? And 2d. What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized? * * *

"The courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered, is the *animus manendi;* and courts

are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear, that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. * * * The next question is, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral, in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state, domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

"But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bonâ fide*, to quit the country *sine animo revertendi.* The *Indian Chief*, 3 Rob. 12, 17. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If anything short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable, that the evidence of a *bonâ fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or, at least, rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to

change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded, which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken, trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and therefore, that as a neutral, the trade was lawful? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted.

"Upon what sound principle, can a distinction be framed, between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicil; and when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows, that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common law and prize courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by Grotius, p. 563, 'that all the subjects of the enemy who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals, whether they be natives or foreigners; but not so, if they are only trading or sojourning for a little time.' And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it (with an exception in favor of such a subject, in relation to his native country), in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, in regard to other states. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens, which make a part of the sum total of its riches, and aug-

ment its power. Vatt. 147; and also, lib. 1, c. 14, sec. 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. Lib. 2, c. 18, sec. 344. Now, if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain, that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

"If, then, nothing but an actual removal, or a *bona fide* beginning to remove, can change a national character, acquired by domicil, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject, what is there that does, or ought, to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended, that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance; and that, until such election is made, his property ought to be protected from capture by the cruizers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove, before it can possibly be known, whether he may elect to do so or not. It is said, that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance, when required to do so; nor will any just nation regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to choose for themselves; and when they have made their election, they claim the right of enjoying it under the treaty; But until the election is made their former character continues unchanged.

"Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruisers of the other belligerent, to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done, in case the owner of it should afterwards elect to remain where he is? or, if captured

and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this court. The rule there, is, that the character of property, during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule, indeed, goes further: as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed, that this change cannot and ought not to be effected by an election of the owner and shipper of it, made subsequent to the capture, and more especially, after a knowledge of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war, and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruizers of his native and deserted country, it is not only free from capture by those of his adopted country, but it is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted."

"James Thompson, a native of Scotland, came to the United States in 1793, and resided there, carrying on trade, till 1801. In 1797 he was naturalized. In 1801 he went to France on the business of his house; he afterwards went to England on similar business. In 1803 he settled in Glasgow, where he continued to attend to the business of his partnership till 1812, when the United States declared war. After knowledge of that event, he transacted no commercial business whatever, but applied himself to arranging his affairs so as

to return to the United States. This accomplished, he engaged passage in August, 1813, on a cartel ship from Liverpool to New York, but, being stopped by orders of the Government, went over to Ireland and privately embarked for the United States, where he arrived in November, 1813. There were affidavits to show that he always considered the United States his permanent place of residence, and that he uniformly expressed his intention to return. His letters manifested the same intention. His business was complicated, and required his attention after he ceased to engage in new adventures. He appeared as the claimant of certain goods of British manufacture, consigned to various persons in the United States and shipped on the ship *Frances*, which sailed from Greenoch, Scotland, for New York, July 19, 1812. The *Frances* was captured by an American privateer, war having been declared by the United States against Great Britain, June 18, 1812. The goods were shipped without knowledge of the war. Held, on the authority of the case of the *Venus*, that, as the rights of Thompson depended on his national commercial character, the goods must be condemned. The *Frances* (1814,) 8 Cranch, 335."

Moore's Digest, vol. 7, pp. 425, 426.

"Certain goods belonged to Colin Gillespie, a native of Great Britain, who emigrated to the United States in 1793 and was naturalized in 1798. He went to Great Britain on commercial business in 1794 and 1796; was in the United States in 1795 and 1797; returned to Great Britain in 1799 and married there; went, in the same year, with his wife, to New York, and remained there till June, 1802; then revisited Great Britain and resided there till November, 1805, when he returned to the United States and formed a partnership in New York; returning in the same year to Glasgow, he continued in business there, both while his partnership lasted and after its dissolution, till July 2, 1813, when he returned to the United States with his family. He kept house at Glasgow, and built a warehouse there, which he still owned, and in which he kept his counting house. He deposed that he determined to return to the United States when he heard of the declaration of war, but was prevented from immediately doing so by engagements and commercial affairs, some of which he finally left unarranged. Held, on the authority of the case of the *Venus*, that the goods must be condemned as enemy property. The *Frances* (1814), 8 Cranch, 363. See The *St. Lawrence*, 1 Gall. 467; The *Frances*, id. 614."

Moore's Digest, vol. 7, p. 426.

"The Danish island of Santa Cruz having been seized by and surrendered to the British, B., an officer of the Danish Government and an owner of land in the island, withdraw and went to Denmark, leaving his estate in the care of an agent, who afterwards shipped 30 hogsheads of sugar, the produce of the estate, on a British ship, to a house in London, on B's account and risk. On her passage the ship was captured by an American privateer and brought into the United States, where, in spite of a claim by B. to the sugar, both the ship and her cargo were condemned.

"Harper, counsel for B., contended that the British rule that the produce of a plantation in an enemy's country was to be considered,

while the produce remained the property of the owner of the soil, as enemy property, was modern, and that, besides, it did not apply to the case of B. By the cases of the *Phoenix*, 5 Rob. 26, the *Diana*, 5 Rob. 60, and the *Vrow Anna Catharina*, 5 Rob. 161, it appeared that the reason of the rule was that the proprietor of the soil had incorporated himself with the permanent interests of the nation. B. had never incorporated himself with the interests of the British nation, either permanently or temporarily; the character was forced upon him against his will; he was born and continued to be a Dane; he did not purchase a plantation in an enemy country, Denmark being, at the time of his purchase, neutral; the British occupation was temporary, and ended with the war. But, even if the case were within the rule, the rule was merely a British rule, never recognized by Denmark, and not a part of the law of nations, and should not be adopted by the United States.

"Pinkney, contra, maintained that Santa Cruz, on its capture, immediately became a British colony, and during the occupation, which, though not perpetual, was indefinite, so remained; that, this being so, the sugar in question was, under the rule in the case of the *Phoenix*, enemy property; that, according to the opposite argument, if the land was purchased before the capture of the island, the owner would not be considered an enemy, though the island should remain permanently British; that, in reality, it was immaterial when the estate was acquired, if the owner continued to hold it after the island came into possession of the enemy. Such was the rule of the English prize courts, and it did not appear that any of the nations of Europe had protested against it. It was not harsher than the rule of domicil, to which it was analogous.

"Marshall, C. J., delivering the opinion of the court, said:

"'Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

"'Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy, property?

"'In arguing this question, the counsel for the claimants has made two points:

"'1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty.

"'2. That the rule has not been rightly laid down in those courts, and consequently will not be adopted in this.

"'1. Does the rule laid down in the British courts of admiralty embrace this case?

"'It appears to the court that the case of the *Phoenix* is precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by per-

sons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

"'The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it: but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir William Scott lays down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this court and of the supreme court, upon very solemn arguments, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior court, that it is no longer open to discussion. No question can be made on the point of law, at this day."

"'Afterwards, in the case of the *Vrow Anna Catharina*, Sir William Scott lays down the rule, and states its reason. "It can not be doubted," he says, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

"'This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzon's claim, because he has not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

"'This distinction does not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

"'The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British: and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

"'The case is certainly within the rule as laid down in the British courts. The next enquiry is: How far will that rule be adopted in this country?

"'The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

"'Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we can not entirely disregard. The United States having, at one time, formed a component part of the British Empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

"'It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

"'The rule laid down in the *Phoenix* is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783 is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

"'The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person any where; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offence to the course of human opinions, to say that the proprietor, so far as respects his interests in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this court is of

opinion that there was no error, and the sentence is affirmed with costs.' Thirty Hogsheads of Sugar *v.* Boyle (1815), 9 Cranch 191. See, also, The Prize Cases (1862), 2 Black, 635, 671; Rivier, Principles, II. 344–345; Hall (4th ed.), 168."

Moore's Digest, vol. 7, pp. 406–410.

The *Mary and Susan* (1816) (1 Wheat. 54): "It has been solemnly stated, and must, henceforth, be considered as the positive law of this court, that shipments made by merchants, actually domiciled in the enemy's country, at the breaking out of a war, partake of the nature of enemy trade, and, as such, are subject to belligerent capture. Whatever doubts may have once been entertained on this bench, with regard to the necessity or propriety of adopting the principle into the jurisprudence of this country, they are now either dissipated or discarded; and the character, views and even the subsequent acts of such a shipper cannot vary the conclusion of law upon his claim."

The *Friendschaft* (1818) (3 Wheat. 14): "The native character does not revert, by a mere return to his native country, to a merchant who is domiciled in a neutral country at the time of a capture, and after the capture leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence, visiting his native country merely on mercantile business, and intending to return to his adopted country. His Neutral domicil still continues." (Syllabus.)

Mr. Justice Story in the *Friendschaft* (1819) (4 Wheat. 105) said: "It has been long since decided in the courts of admiralty that the property of a house of trade, established in the enemy's country, is condemnable, as prize, whatever may be the domicil of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it, therefore, treated as enemy's property, notwithstanding the neutral domicil of any of the company. The rule, then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained, if the case were entirely new."

In the *Gerasimo* (1857) (11 Moore's P. C. 88, Scott, 811) it is said that "The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the power under whose dominion he carries it on, and, of course, as an enemy of those with whom that power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

"Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, it is sufficient that the territory in question should be occupied by a hostile force, and subject, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily,

be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

"It appears to their lordships that the first opposition cannot be maintained. It is impossible for any judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their lordships are inclined to think that if the authorities which were cited and so ably commented upon at this bar had been laid before the judge of the court below, he would, perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred.

"With respect to the meaning of the term 'dominion of the enemy,' and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of *The Fama*, 5 Rob. 115, he lays it down that in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. 'This,' he observes, 'is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, when a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what laws they are to live.'

"The importance of this doctrine will appear when the facts with respect to the occupation of the principalities come to be examined.

"That the national character of a place is not changed by the mere circumstance that it is in possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the lords of appeal in 1808, in the St. Domingo cases of the *Dart* and *Happy Couple*, when the rule operated with extreme hardship.

"In the case of *The Manila*, 1 Edw. 3, Lord Stowell gives the following account of those decisions: 'Several parts of it (the island of St. Domingo) had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts, at least, an independent government of their own. And although this new power had not been directly and formally recognized by an express treaty, the British Government had shown a favorable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been done or declared by the British Government that could authorize a British tribunal to consider this island generally, or parts of it (notwithstanding a power hostile to France had established itself within it, to that degree of force, and with that kind of allowance from some other states), as being other than still a colony of the enemy. There can be no doubt that the strict principle of the decision was correct.'

"On the other hand, when places in a friendly country have been seized by, and are in the possession of the enemy, the same doctrine has been held.

"While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by French troops, and amongst others, the port of St. Andero. A ship called the *Santa Anna* was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed: 'Under these public declarations of the state, establishing this general peace and amity, I do not know that it would be in the power of the court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property.'

"The same principle has been acted upon in the courts of common law. (See Donaldson *v.* Thompson, 1 Campb. 429; Hagedorn *v.* Bell, 1 Mau. and Sel. 450).

"The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognized by Lord Stowell in the case of *The Boletta*, 1 Edw. 171. A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property, that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes, p. 173: 'On the part of the Crown it has been contended that the possession taken by the French was of a forcible and temporary nature, and that such possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia.' On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this was a cession by treaty, and not a hostile occupation by force of arms, liable to be lost again the next day.

"These authorities, with the other cases cited at the bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies."

The *Sarah Starr* (1861). (Blatch. 69):

"The American authorities are equally explicit, that a neutral, even enjoying the privileges of consul, domiciled and trading in a belligerent country, is, in war, deemed a belligerent, and his acts are clothed with the character of one of its subjects; and he can neither hold title to property acquired in such country during war, nor confer it upon others, against the interests imparted, by capture at sea, to adversary belligerents. (The *Venus*, 8 Cranch, 253; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191; The *Ann Green*, 1 Gall., 284; The

San Jose Indiano, 2 Gall., 268; The *Mary and Susan*, 1 Wheat., 54, note f; 1 Kent's Comm., 72, 75; Wheat. Internat. Law, ch. 1, sec. 17. See also Manning's Law of Nations, 7.)

"So far, then, as the proofs disclose the actual facts attending the acquisition of the cargo placed on board the *Sarah Starr* in North Carolina, it was wholly the property of the Munroes, acquired by them there jointly during the war, and is lawful prize of war on both considerations—that they purchased it in an enemy country, and that they, at the same time, had a commercial domicile there."

In the case of the *Sarah Starr* the court, in referring to the *Aigburth*, a vessel owned by the owner of the *Sarah Starr* and whose condemnation was asked at the same time, said:

"The papers taken with the vessel show that the transmission of the outward cargo and the return one was made through the intermediation of the house of Fraser & Co., of Charleston, as agents of the claimant; and thus far the outside evidence supports the claim of ownership of this claimant in the cargo captured, because a prize court regards merchandise to be the property of the shipper or consignor, and not of the consignee, unless there be clear proof to the contrary. (The *Abo*, 1 Spinks' Prize Cases, 42.) Certainly this will be the rule when no other supposed owner litigates the right of property. The return cargo, then, simply as enemy property, is liable to arrest at sea as prize, whether its destination be to the enemy port, or to one in a neutral and friendly country. No distinction is marked, in the cases, between the liability of property taken at sea, owned by a neutral who is stamped with the character of an enemy by his commercial residence and dealing in the enemy's country, and the native residents thereof.

"Dr. Lushington comments upon the character of a neutral commercially domiciled in an enemy country in these terms: 'There is no principle, I apprehend, so well laid down, no principle so generally true, as this: that whatever country a gentleman may belong to, if he is resident in and carries on trade for a period of time in another country, he must be taken, for the purpose of trade, to belong to that other country, and not to his original domicile.' (The *Johanna Emilie*, 1 Spinks' Prize Cases, 16.) That vessel was owned by Rucker, a neutral, and the Hanoverian consul, resident in Riga, and was sold by his authority at Newcastle, and purchased by another Hanoverian, previous to a declaration of war; but the court held her to belong to Rucker, who, by his domicile, was an enemy, and condemned her as good prize.

"It appears to me, therefore, in view of the rules of law applicable to the question, that the claimant Gravely, in the character of a neutral and a British subject by birth, was, within the purview of the public law, in his mercantile relations, an enemy of the United States at the time the two above-named vessels were captured, and that they, together with so much of their respective cargoes as belonged to him, are lawful prizes. The manifest principle of that jurisprudence divests the man acting in promotion of the interests of one belligerent, in its commercial, military, or fiscal operations, of all protection against the other, under the shield of foreign birth or allegiance, and stamps him with the character of the party whose ends his conduct subserves; and his planting himself as a resident within the dominions of an enemy, and there carrying on a traffic

in vessels or merchandise tending to the benefit of the belligerent with whom he is domiciled, constitutes him an enemy of the other, and renders his property so acquired or used just prize of war."

In the *Prize Cases* (1862) (2 Black, 674, Scott, 601) the Supreme Court of the United States considered the question of how far residence will invest property with enemy character. "'All persons residing within this territory," that is, the territory organized and controlled by the belligerent, "whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

"But in defining the meaning of the term 'enemies' property,' we shall be led into error if we refer to Fleta and Lord Coke for their definition of the word 'enemy.' It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

"Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. 8 Cr.., 384. The owner, *pro hac vice*, is an enemy. 3 Wash. C. C. R., 183.

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory."

In the case of the *Sally Magee* (1863) (Blatch. 382) the question was raised as to the ownership of certain cargo shipped at a neutral port and consigned to persons residing in an enemy port. The court said: "In contemplation of law, the cargo became the property of the consignees from the time of its being laden on board of the ship, and from the execution of the bills of lading therefor at Rio Janeiro, May 10, 1861. This is a settled doctrine of the American courts of law and admiralty, and, correlatively, of prize courts. (Grove *v.* Brien, 8 How., 429; Fitzhugh *v.* Wiman, (in error,) 9 New York, 5 Selden, 562; Lawrence *v.* Minturn, 17 How., 100, 107; McKinlay *v.* Morrish, 21 How., 355; The *Merrimack*, 8 Cranch, 317.)

"The intervention of the claimants rests upon a supposed right or equity in them to counteract the operation of that rule, and to rescue these consignments from its effect by the interposition of tacit priorities possessed by them. There is scarcely a principle more unquestionably recognized in prize procedures than that belligerent captors are discharged of liens or equities of neutral creditors resting upon the effects of an enemy seized at sea. (Upton's Maritime Law 2d edition, and cases collected, 153, 158.)"

This case in so far as cargo was concerned was affirmed by the Supreme Court, (3 Wall. 451).

In the case of the *Mary Clinton* (1863) (Blatch. 556) the court said "It appears, by the pleadings, that the cargo on board of the vessel was procured at Charleston, by residents domiciled there, who acted as agents for John R. Armstrong, who is represented to be

the owner of the cargo, and to be a neutral, resident in Great Britain. It matters not that Armstrong has a copartnership interest with his agents domiciled in the enemy's country, in the trade conducted in the products of that country with the enemy of the captors. A neutral friend to both belligerents cannot transport over the sea the effects of one to the use of the other, though also his friend. He is not allowed to aid and benefit the commerce of one belligerent to the prejudice of the other. By investing his means, and participating in the trade and mercantile concerns of a belligerent nation, a neutral has, in effect, affixed to him the national character of the places at which he carries on his commerce. (Halleck's International Law, ch. 29, sec. 26, 27; Upton's Mar. War., 124; The *Dree Gebroeders*, 4 Ch. Rob., 232.) The produce of the enemy's soil and country, owned by a neutral, while it remains in the enemy's country, particularly if obtained therein by a resident agent of the neutral merchant, has imparted to it the stamp of enemy property, and the owner is, *pro hac vice*, an enemy. (Sup. C. U. S. Decisions, note; Wheat. on International Law, Lawrence's ed., Supp., page 20; The *Vigilantia*, 1 Ch. Rob., 1.) The interest of the claimant Armstrong in the cargo procured by him in Charleston, and shipped on the voyage in question, falls within the principle, and is confiscable as enemy property. It is, also, directly so in consequence of its having been knowingly transported from an enemy port under blockade, and designed to be carried to another blockaded port, and being arrested in the effort to break the blockade of New Orleans. The knowledge of the master and his culpable purpose are established by the written warning indorsed on the register of his vessel, and are proved, against his denial on his examination *in preparatorio*, by that document, and also by the testimony of the first mate of the vessel, on the same examination. The fact of the blockade, both at the port of departure and the port of destination, at the time of the appearance of the vessel before those lines, and its efficiency, are demonstrated by the actual arrest of the vessel at each of its attempts to pass them."

In the case of the *Pioneer* (1863) (Blatch. 666) a foreign consul resident in enemy country set up title as part owner of a vessel and cargo captured as enemy property.

The court said: "It is admitted that, in the case of a foreign consul who is carrying on trade as a merchant in the enemy's country, his consular residence and character will not protect that trade from interruption by the seizure and condemnation of his property as enemy property; and that, notwithstanding his consular character, he is to be considered, in all commercial transactions, as on the same footing with any other resident merchant. The mere fact, therefore, that De Voss was a resident consul, cannot confer upon him any privileges, so far as concerns his commercial transactions, over any other merchant resident in the enemy's country. He stands on the same footing as his partner Mr. Hanniwinkle. His property, engaged in a trade which is carried on in the enemy's country, finds no exemption, according to the international code, from the laws of war.

"I agree that if, in addition to his consular character, it had been shown that, on the breaking out of the war, he had dissolved his partnership and put an end to his business as a merchant, continuing

his residence solely as consul, there would be great force in the position that his interest in this ship and cargo, which were intercepted and prevented from entering the enemy's port with a view to send them to a loyal one, should not be regarded as enemy property. The case would have presented a strong analogy to that of a resident merchant in the enemy's country, after the commencement of the war, breaking up his business, with all reasonable diligence collecting his effects, and withdrawing both of them from the country. His consular character would have explained the reason for his not leaving the country himself. But in this case, for aught that appears—and if otherwise, it devolved on the claimant to show it, it being a material fact in his case—he has continued his partnership business the same since as before the war. I cannot, from the single fact that he diverted the property in question from the enemy's country, and especially from a blockaded port, where it was liable to capture, and sent it to a loyal one, infer that this was followed up by his putting an end to his business as a merchant at Richmond. If not, I must regard him as I would any other merchant engaged in trade in the enemy's country."

In the case of the *Cheshire* (1865) (3 Wall. 231) it is said that "no principle is more firmly settled than that the property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize without regard to the domicile of the partners. The trade of a house of this kind is essentially a hostile trade, and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile. Such trade tends directly to add to the resources and revenues of the enemy, and, as observed by Mr. Justice Story (*San Jose Indiano*, 2 Galli. 284), 'there is no reason why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce, and at the same time possess all the advantages of a neutral character.'"

The *Grey Jacket* (1866) (5 Wall. 342):—"The liability of the property [to condemnation] is irrespective of the *status domicilii*, guilt or innocence of the owner. If it comes from enemy territory, it bears the impress of enemy property. If it belongs to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government. The only qualification of these rules is, that when upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which otherwise attend it."

In Mitchell *v.* United States (1874) (21 Wall. 350, Scott, 605) it was said that "property taken at sea, belonging to persons domiciled in the insurgent States, was uniformly held to be confiscable as enemy property."

In the case of the cargo *ex Ekaterinoslav* (1904) (2 Russ.-Jap. P. C. 10) a Russian merchant vessel was captured with a cargo from

a German firm at an enemy port consigned to a branch of the same firm at another enemy port. The owners claimed restitution of cargo on the ground that neutral goods on enemy vessels were exempt from capture.

In condemning the cargo as good prize the Sasebo Prize Court said:—

"International Law permits the capture in time of war of enemy goods carried in an enemy ship, whether they be contraband of war or not, and the question whether goods are enemy goods or not depends, not on the nationality of their owner, but on his domicile, or, in the case of a merchant, the place of his business. These goods are, therefore, clearly enemy goods, being despatched from the Vladivostock branch of Kunst and Albers to their Odessa branch, and are liable to condemnation. This Prize Court has no competence to decide on claims for freight or travelling expenses, and therefore the claim in regard to them must be rejected.

"The claimants presented an appeal to the Higher Court, which was dismissed upon the same grounds on the 30th of May, 1905."

In the case of the cargo *ex Mukden*, Goudereau's Claim (No. 1), (1904) (2 Russ-Jap. P. C. 24) the Sasebo Prize Court held "that goods which a neutral Government sends to one of its officials residing in one of the belligerent countries are to be respected." This particular part of the cargo was accordingly released.

In the case of the cargo *ex Mukden*, Yak Yuk Chang's Claim (1904) (2 Russ-Jap. P. C. 25) it was held that a consignment of goods shipped by a neutral merchant to another neutral merchant doing business at an enemy port was a good prize as being enemy property. The court said "that according to the rules and usage of existing International Law, enemy goods in an enemy ship are liable to capture, irrespective of whether they are or are not contraband or of whether they were or were not despatched before the outbreak of war. The question as to whether goods are or are not enemy goods is determined by the domicile of their owner. Further, the ownership of cargo, so long as there is no proof to the contrary, is to be deemed to lie with the consignee. The goods in this case were goods shipped in an enemy vessel, the *Mukden*, and sent to a person permanently residing and carrying on business at Vladivostock, in the enemy country; moreover, the claimant has brought forward no proof to show that the ownership of the goods lay with him. They must therefore be condemned as enemy goods and decision is accordingly given as stated above."

In the claim of the China Sugar Refining Company for a part of the cargo on the *Manchuria* (No. 1) (1904) (2 Russ-Jap. P. C. 59) by reason of the fact that they were shipped by a neutral consignor, the Sasebo Prize Court said: "It is a general rule that when goods which have been ordered are despatched, the ownership of them vests in the consignee from the moment of despatch, whether they have been paid for or not, unless there be a special agreement to the contrary. In this case the 30 cases of rum were despatched on an order from a Russian firm, Messrs. Ginsburg & Co. of Port Arthur, an enemy port, and the claimants are unable to produce any evidence as to the time when the ownership was to pass. It may, therefore, be held, in accordance with the general rule, that at the time of capture

the ownership of the goods had already passed to the Russian firm. Being owned by a Russian firm, and on board a Russian steamer, it is clear that the goods were enemy goods on board an enemy ship, and were lawful prize, and should therefore be condemned."

In the case of the *Fuping* (1904) (2 Russ-Jap. P. C., 177) the Japan Prize Court held that "it is a general rule of International Law" that the cargo of a vessel breaking blockade, "with the exception of cargo belonging to persons absolutely ignorant of the circumstances, may be condemned with the vessel."

In the case of the cargo *ex Mukden*, Kunst and Albers' Claim (1905) (2 Russ.-Jap. P. C. 31) the Higher Prize Court of Japan said: "Paragraph 7 of the appeal states that the ownership of the goods in question was vested in the consignors, and that they ought not, therefore, to be condemned as enemy property. But the rule that goods, which a person not domiciled in enemy territory sends in time of war by an enemy ship, addressed to a consignee in enemy territory, are invested with a hostile character, and may accordingly be condemned, is recognised by international usage, and this Court considers the rule to be conformable to reason."

See to the same effect the decision in the case of the claim of the Russo-Chinese Bank, claimant to a part of the cargo on the *Mukden* (2 Russ-Jap. P. C. 36).

In the case of the *Mukden* (1905) (2 Russ-Jap. P. C., 12) an enemy merchantman was captured with a cargo in part consigned to a neutral firm maintaining a place of business in an enemy port. The owners of this part of the cargo claimed restitution on the ground that it was neutral property.

The Higher Prize Court of Japan in sustaining the decree of the lower court in condemning this particular property, said that "goods shipped by a person living outside the enemy territory, in an enemy vessel and consigned to a person residing in the enemy territory, are enemy property and liable to condemnation. This is a rule recognized by international usage, and this Court considers it fair and reasonable. And as this rule is applicable to such goods shipped in an enemy vessel, no matter under what circumstances, the third and fourth points of the appeal fail."

In the case of the *Manchuria* (No. 1) (1905) (2 Russ-Jap. P. C., 52) the Higher Prize Court of Japan said: "In determining the nationality of the cargo for purposes of capture, international usage recognizes that the principle of domicile may be followed, and this Court considers that the rule is in accordance with reason. Even assuming, therefore, that the parcels of goods referred to in the fourth argument are, as the appellants assert, still the property of the neutral consignors at St. Petersburg Ewald Tschirmans u. Compagnie, the said comapny being in International Law an enemy, the goods are enemy goods, and being in an enemy vessel ought properly to be captured. The second supplemental argument is therefore groundless. With regard to the goods insured by neutrals, as they are all goods shipped in an enemy vessel, and despatched to enemy territory, they are liable to capture, and even if, as the appellants assert, they were insured by neutrals, the existence of an insurance contract cannot be made a reason for the release of goods having an enemy character. The third supplemental argument is, therefore, also inadmissible."

Huth's claim to a part of the cargo of the *Manchuria* (No. 1) (1905) (2 Russ-Jap. P. C., 69) covered a consignment of teas shipped on the *Manchuria* by a neutral firm from a neutral port "on bills of lading made out to order of said firm, and despatched via Dalny as goods to be delivered to the order of consignors in Moscow. The consignors could deal with the said goods as they wished, according as the amount of the bill of exchange drawn by the consignor was or was not paid, so that, at the time of capture, they were the property of the consignors the subjects of a neutral country, and could not be captured as enemy goods."

The lower prize court held this contention without merit and accordingly condemned the goods. On appeal the Higher Prize Court of Japan sustained the lower court, saying that "the fact that the appellants accepted bills of exchange drawn to the accounts of the Russian W. J. Popoff Company and M. P. Medvedjeff's Erben Tea Company goes to prove that the appellants had undertaken the obligation to pay the price of the said goods on behalf of those firms, and this, coupled with the fact that the goods were actually in transit to Moscow, is sufficient to establish that the goods were despatched to the address of the above two companies, who are domiciled in an enemy country. It is recognised by international usage that goods which a person domiciled in a neutral country despatches in an enemy ship in time of war to a consignee in an enemy country are invested with an enemy character and accordingly are liable to capture; so that capture cannot be avoided on the ground of the acceptance by a neutral of a bill of exchange drawn against the goods. International Law also recognises that the capture of enemy goods in an enemy ship may be effected after the inception of a state of hostilities irrespective of the fact of shipment before the opening of hostilities, or of the ignorance of the master or consignor of the fact of the opening of hostilities."

GOODS ON BOARD ENEMY VESSEL PRESUMED TO BE ENEMY GOODS, IN ABSENCE OF PROOF TO THE CONTRARY.

In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.—*Article 59, Declaration of London, 1909.*

"Article 59 gives expression to the traditional rule according to which goods found on board an enemy vessel are, failing proof to the contrary, presumed to be enemy goods: this is merely a simple presumption, which leaves to the claimant the right, but at the same time the onus, of proving his title."

General report of drafting committee to London Naval Conference.

Liens on Goods.

"In determining the national character of property, courts of prize generally look only to the legal title; and when, from the papers, the right of property in a captured ship or cargo appears to be vested in an enemy, no equitable or secret liens of a neutral or a subject can be made the foundation of a claim to defeat or vary the rights of the captors. The only exception to this rule, is where the lien is immediately and visibly incumbent upon the property, and consequently, is one which the party claiming its benefit has the means of enforcing without resort to legal process. Of such a nature is the freight due to the owner of the ship, for the ship-owner has the cargo in his possession, subject to his demand of freight money, by the general law, independent of any contract. The distinction between the two classes of liens is properly expressed in the language of the civil law, by regarding one as a *jus ad rem*, and the other as a *jus in re*."

Halleck, p. 487.

"In time of peace goods once loaded on board a vessel belong to the consignee as a general rule, which may, however, be reversed by special agreement. But in war, if the consignee is an enemy, no special agreement can divest him of his proprietary rights in them from the moment they are ready to start on their voyage. If, however, he is neutral, proof may be required that he, and not the enemy consignor, is the real owner. The presumption is that the cargo of an enemy vessel consists of enemy goods, but it may be rebutted by evidence to the contrary."

Lawrence, p. 382.

"It is an old customary rule that all goods found on board an enemy merchantman are presumed to be enemy goods unless the contrary is proved by the neutral owners concerned."

Oppenheim, vol. 2, p. 115.

"10. * * * *Observation.*—All property found in an enemy ship is to be considered as enemy's property unless the contrary is proved."

Russian Prize Regulations, 1895.

"20. (a) The captain will regard the goods found on board an enemy ship as enemy goods, unless the neutral character of the goods is clearly shown." * * *

German Prize Rules, 1909.

"27. * * * If the neutral character of goods found on board an enemy vessel is not established, the goods are presumed to be enemy."

French Naval Regulations, 1912.

Article 59 of the Declaration of London, 1909, substantially appears as Art. 46 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the case of the *Juno* (1 C. Rob. 100), Sir William Scott said that "goods shipped in the enemy's country are to be considered prima facie as the property of the enemy, and can only be taken out of that presumption, by fair and unbiased evidence, and not from evidence supplied only from the enemy."

In Cleveland *v.* Walvart (Mass. S. C., 1778) (7 Dane's Abridgment, Ch. 227, par. 14, p. 649) the court decided that goods found in an enemy's ship are to be deemed enemy's goods till the contrary is shown.

The *Rapid* (1814) (8 Cranch, 155): "Everything that issues from a hostile country is, prima facie, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offense which, under a well-known rule of the civil law, deprives him of his right to prosecute his claim."

In the case of *The Flying Fish* (1815) (2 Gall. 373, 9 Fed. Cases No. 4892, affirmed 2 Cranch, 170), Mr. Justice Story said: "It is the general rule of the prize law, that all goods found on board of an enemy's ship, are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon and accompanies them. * * * If a neutral will ship his goods in an enemy's ship, he is bound to send with them such documents as shall clearly evince their neutral character. If he neglects so to do, he justly incurs the penalty of forfeiture. Any other course would subject the prize tribunals to endless impositions and frauds; and enable the enemy, by suppressing the documentary evidence of his ownership, to obtain in all cases the benefit of further proof, and to evade the just rights of cruisers."

In the case of *The London Packet* (1820) (5 Wheat. 131) an enemy vessel captured during the War of 1812, the court said: "The captured vessel was confessedly British property, as well as a great part of the cargo, and its destination was a port in the enemy's country, which raises a legal presumption, that the property claimed was not neutral. In this case the court found from the evidence that the property claimed did in fact belong to a neutral citizen. The property was accordingly released.

The *Sally McGee* (1865) (3 Wall. 451): "When a vessel is liable to confiscation, the first presumption is that the cargo is in the same situation." The court in this case cited 2 Wheat. Appendix 24.

The *Jenny* (1866) (5 Wall., 183): "In proceedings in libel against a ship and cargo as prize of war, the burden of proving neutral ownership of them is upon the claimants. When there is no proof of such ownership, and still more when the weight of the evidence is that the ownership is enemy ownership, condemnation will be pronounced." (Syllabus.)

In the case of the *Carlos F. Roses* (1899) (177 U. S. 655, Scott, 637) it was said that "as the vessel is an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall 451; *The Benito Estenger*, 176 U. S. 568."

In the case of the cargo *ex Mukden*, Boeddinghaus' Claim (1904) (2 Russ-Jap. P. C. 19) a part of the cargo on an enemy merchantman was claimed by the neutral consignor. The Sasebo Prize Court in condemning the property said that "it is recognized by International Law that when goods are placed on board a vessel and despatched to the address of a person residing in the enemy country, unless there is evidence to the contrary, the ownership of such goods passes to the consignee from the moment they are shipped. The goods in question were therefore clearly enemy goods."

In An Huo Tai's Claim to a part of the cargo of the *Manchuria* (No. 1) (1905) (2 Russ-Jap. P. C. 65) it was contended that a box of clothing consigned to a neutral merchant company doing business in an enemy port was in reality the property of a neutral employee of the firm temporarily residing in the enemy port. With respect to this contention the Higher Prize Court of Japan said that "it is clear, however, from the manifest and the bill of lading that the consignee of the box was the Teh Wo Company, in the Russian leased territory of Dalny, and there is nothing to prove that the box of clothing was the property of Kuang Chiu, or that Kuang Chiu was only making a temporary stay in Dalny. The contentions of the appellant therefore on this point cannot be sustained."

ENEMY GOODS ON ENEMY VESSEL RETAIN CHARACTER THROUGHOUT VOYAGE—EXCEPTION IN CASE OF STOPPAGE IN TRANSITU.

Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.—*Article 60, Declaration of London, 1909.*

"This provision contemplates the case where goods which were enemy property at the time of dispatch have been the subject of a sale or transfer during the course of the voyage. The ease with which enemy goods might secure protection from the exercise of the right of capture by means of a sale which is made subject to a reconveyance of the property on arrival has always led to a refusal to recognize such transfers. The enemy character subsists.

"With regard to the moment from which goods must be considered to acquire and retain the enemy character of their owner, the text has been inspired by the same spirit of equity as governed the convention of The Hague, relative to the status of merchant vessels on the outbreak of hostilities, and by the same desire to protect mercantile operations undertaken in the security of a time of peace. It is only when the transfer takes place after the outbreak of hostilities that it is, so far as the loss of enemy character is concerned, inoperative until the arrival of the goods in question. The date which is taken into consideration here is that of the transfer, and not of the departure of the vessel. For, while the vessel which started before the war began, and remains, perhaps, unaware of the outbreak of hostilities, may enjoy on this account some degree of exemption, the goods may nevertheless possess enemy character; the enemy owner of these goods is in a position to be aware of the state of war, and it is for that very reason that he is likely to seek to evade its consequences.

"It was, however, thought right to add what is, if not a limitation, at least a complement agreed to be necessary. In a great number of countries an unpaid vendor has, in the event of the bankruptcy of the buyer, a recognized legal right to recover the goods which have already become the property of the buyer but not yet reached him (stoppage in transitu). In such a case the sale is canceled, and, in consequence of the recovery, the vendor obtains the goods again and is not deemed ever to have ceased to be the owner. This right gives to neutral commerce, in the case of a genuine bankruptcy, a protec-

tion too valuable to be sacrificed, and the second paragraph of article 60 is intended to preserve it."

General report of drafting committee to London Naval Conference.

"ART. 51. * * * Enemy goods found on board an enemy ship retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

"If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they retain their neutral character."

Institute (1913), p. 187.

"Property which has a hostile character at the commencement of the voyage cannot change that character by assignment, while it is *in transitu*, so as to protect it from capture. This would lead to fraudulent contrivances to protect the property from capture, by colorable assignments to neutrals. But if a shipment be made in peace, and not in expectation of war, and the contract lays the risk of the shipment on the neutral consignor, the legal property will remain to the end of the voyage in the consignor. During peace, a transfer *in transitu* may be made; but when war is existing or impending, the belligerent rule applies, and the ownership of the property is deemed to continue as it was at the time of the shipment until actual delivery. This illegality of transfer, during or in contemplation of war, is for the sake of the belligerent right, and to prevent secret transfers from the enemy to neutrals, in fraud of that right, and upon conditions and reservations which it might be impossible to detect. So property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken *in transitu* as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. The prize courts will not allow a neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master are considered as delivered to the consignee. All such agreements, though valid in time of peace, are in time of war, or in peace, if made in contemplation of war, and with intent to protect from capture, held to be constructively fraudulent; and if they could operate, they would go to cover all belligerent property, while passing between a belligerent and a neutral country, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of those relations. These principles of the English admiralty have been explicitly recognized and acted upon by the prize courts in this country. The great principles of national law were held to require, that, in war, enemy's property should not change its hostile character, *in transitu;* and that no secret liens, no future elections, no private contracts looking to future events, should be able to cover private property while sailing on the ocean. Captors disregard all equitable liens on enemy's property, and lay their hands on the gross tangible property, and rely on the simple title in the name and possession of the enemy. If they were to open the door to equitable claims, there would be no end to discussion and imposition, and the simplicity and celerity of pro-

ceedings in prize courts would be lost. All reservation of risk to the neutral consignors, in order to protect belligerent consignees, are held to be fraudulent; and these numerous and strict rules of the maritime jurisprudence of the prize courts are intended to uphold the rights of lawful maritime capture, and to prevent frauds, and to preserve candor and good faith in the intercourse between belligerents and neutrals. The modern cases contain numerous and striking instances of the acuteness of the captors in tracking out deceit, and of the dexterity of the claimants in eluding investigation."

Kent, vol. 1, pp. 95–97.

Actual delivery, however, "terminates the transitus, so far as liability to capture is concerned." The *Baltica*, 11 Moore P. C. 141, Baltazzi *v.* Ryder, 12 id. 168, The *Panaghia Rhomba*, 12 id. 188; Kent, Vol. I, 95, Note 1.

The common law doctrine of the right of stoppage in transitu in time of peace is abrogated in time of war. It is "the general and well settled rule of the English admiralty, that, in time of war, the national character of property cannot be changed by a transfer to a neutral during the transportation. That which was enemy's property at the commencement of the voyage, remains liable to capture, until its arrival at the port of destination. Nor, is the application of the rule confined to a transfer in actual war. If it appear that the immediate motive of the transfer, although made in time of peace, was the expectation of war, and that this fact was known to the purchaser, the contract is held to be equally invalid, as against the belligerent whose right of capture was meant to be evaded. 'These rights, however,' says Mr. Duer, 'are an apparent difference in the mode of applying the rule in these cases. In the latter, positive evidence of the intentions of the parties is plainly required; but, in the first, the fact of a transfer is regarded as conclusive proof of the intended fraud.' This doctrine seems to have been adopted in its full extent, by the supreme court of the United States. The rule of admiralty, in these and other cases which we have mentioned, is different from that of common law, and its vindication is rested on the ground that its adoption is necessary to the prevention of fraud. A change in the national character of the owner, during the voyage, is not allowed to change the hostile character of property *in transitu.* If he was an enemy at the commencement of the voyage, the property is condemned, notwithstanding he may have become a subject of the capturing power previous to the capture. A Dutch ship, owned and claimed by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland, nearly two months after the inhabitants of Good Hope, under the capitulation, had sworn allegiance to the British crown, and had become British subjects. Their ship was condemned, on the sole ground that, 'having sailed as a Dutch ship, her character during the voyage could not be changed.' The propriety of this decision has been seriously questioned. Although the character of property is not permitted to be varied *in transitu*, from hostile to friendly, or neutral, so as to exempt it from capture and confiscation, nevertheless, if it be neutral or friendly at the commencement of the voyage, its character may be so effectually altered before its termination as to ensure its con-

demnation. As a general rule, no matter what its character at the commencement of the voyage, if its owner is an enemy at the time of the capture, the seizure is lawful and confiscation a necessary consequence. Its fate is determined by the real or constructive character of its ownership at the time of seizure; by its real character, if hostile at the time of capture, and by its constructive character, if neutral or friendly when seized, but hostile at the commencement of the voyage. The rights of the captors are vested at the time of the seizure, and cannot be divested by any subsequent change in the national character of the owner. Previous to adjudication, the owner may have become a neutral, an ally, or a subject, but in neither capacity can he claim exemption from confiscation of property seized while he was an enemy. Nor, to warrant a condemnation, is it in all cases necessary that the owner should be an actual enemy at the time of capture. If the seizure is provisionally made in contemplation of hostilities, a subsequent declaration of war has a retroactive effect, converting the neutral or friendly owner into a public enemy, and the precautionary seizure into an act of war. The seizure is at first regarded as provisional, or rather an act of an equivocal character, to be determined by subsequent events. If, in the language of Sir Wm. Scott, the dispute terminates in a reconciliation, the seizure is regarded as a mere civil embargo; but if war follow, it impresses upon the original seizure a direct hostile character. But this particular point has been discussed in another chapter. (Duer. on Insurance, vol. 1, pp. 441–444; Vattel, Droit des Gens, liv. 2, ch. 18, sec. 342; Chitty Com. Law, vol. 1, pp. 60, 61; Phillimore, on Int. Law, vol. 3, sec. 21; Wheaton, Elem. Int. Law, pt. 4, ch. 1, sec. 4; The *Bodes Lust*, 5 Rob. Rep., pp. 233–250; The *Diana*, 5 Rob. Rep., p. 60; Wildman, Int. Law, vol. 2, pp. 101, 102.)"

Halleck, pp. 481–483.

Ownership of Goods in Transit.

"The general rule of law, both international and civil, or common, is, that goods in the course of transportation from one place to another, if they are shipped on account and at the risk of the consignee, in consequence of a prior order or purchase, are considered as his goods during the voyage. The master of a ship, who receives goods, that, by the bill of lading, are expressed to be, and, in fact, are, shipped on account of the consignee, becomes, by the very act, the agent of that consignee, so that the delivery to him has the same effect in vesting the property, as a delivery to his principal. Hence, goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to, and to become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, *in itinere*, and subject to capture and confiscation. This general rule, as to the effect of a delivery of goods, to the master, for a foreign purchaser, may, both by the civil and common law, be varied by an express stipulation between the parties, or by the usage of a particular trade. If the parties agree that the payment for the goods shall be contingent upon their actual delivery at the foreign port, the whole risk of the voyage being cast upon the shipper, and the contract of sale, until a delivery, being incomplete and executory, the goods, during the voyage, in judgment of law, remain the property of the shipper. So, if the prevailing usage of a

particular trade casts the risk upon the consignor, the delivery to the master is not regarded, in law, as a delivery to the consignee; for such a usage presupposes the general agreement of the merchants engaged in the trade to which it refers. But neither of these exceptions to the general rule, that the delivery to the master, as the agent of the consignee, is a delivery to the principal, is admitted in courts of prize, for the very conclusive reason, that, to permit goods, in time of war, to be considered the property of the neutral consignor, instead of the enemy consignee, merely on the ground that the former had assumed the risk of transportation, would at once put an end to captures of enemy's property on the high seas. On every contemplation of a war, in the consignments of goods from neutral ports to an enemy's country, the risk of transportation would be laid on the consignor, and the right of capture would be completely frustrated. Hence, says Sir William Scott, that part of the contract laying the risk of transportation, in time of war, upon the neutral consignor, is invalid; or rather, as the captor has all the rights which belong to the enemy, his taking possession is considered equivalent to an actual delivery to the enemy consignee. The foregoing rule of the prize courts of England, that property consigned to, and to become the property of an enemy, upon arrival, cannot be protected by the neutrality of the shipper, has been explicitly recognized and acted upon by the prize courts of the United States, and approved by American writers of the highest authority. No case directly in point has yet been decided by the supreme court of the United States, but the doctrine has been affirmed in analagous cases, resting substantially on the same grounds; and Mr. Justice Story, in the United States circuit court, says, 'that in time of war, property shall not be permitted to change character in its transit, nor shall property consigned to become the property of an enemy upon its arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war, or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean.' Chancellor Kent, in his commentaries, says, that 'property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken, *in transitu*, as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. The prize courts will not allow the neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master, are considered as delivered to the consignee. All such agreements are held to be constitutionally fraudulent, and, if they would operate, they would go to cover all belligerent property while passing between a belligerent and a neutral country; since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in one or other of these relations.' A contrary doctrine has been held by the courts of the state of New York, but as the decisions of state courts are not of authority in questions of prize, the rule, as decided by Justice Story, must be regarded as established in the United States. * * *

"This rule is not confined to cases where the contract and shipment are made in time of actual war. If they are made in time of peace, but in contemplation of war, and with the manifest intention of protecting the property from hostile capture, they are equally a fraud upon the belligerent power to which the right of capture belongs; and the reasons for the rule of the prize courts, in cases of contract made in time of actual war, given by Sir William Scott and Justice Story, in their decisions, and by Chancellor Kent, in his commentaries, are equally applicable to contracts made in time of peace, but in contemplation of war. We do not, however, find any decision directly on this point: but the view of this question taken by Mr. Duer seems to be fully sustained by the reasoning of the courts in the cases to which reference is made in the foregoing paragraph. If goods contracted for, and shipped in time of actual war, are liable to capture on the ground of *fraud* upon the rights of a belligerent, assuredly the same rule would, for the same reason, apply to the same transactions made with the same intention, in contemplation of war. * * *

"And if the contract is made during a peace, and not in contemplation of war, but the shipment be made after hostilities have commenced, and with a knowledge of the war, the private agreement of the parties, by which the neutral consignor assumes the risk of delivery, will not be permitted to affect the rights of the capturing belligerent. For it was the duty of the consignor, and within his power, in this case, equally as in the former, to guard himself from a contingent loss arising from capture, by requiring a proper security from the consignee. Without such security, he was not bound to make the shipment at all, since, as the contract was not made in expectation of a war, so material a change in its risks, as contemplated by the parties in making the contract, would absolve him from its execution. * * *

"But where the shipment of the goods, as well as the contract, laying the risk on the neutral consignor, are both made in time of peace, and not in contemplation of war, the legal ownership which was in the consignor, at the inception of the voyage, remains in him until its termination. The property of the consignor is not divested in favor of a belligerent, by the breaking out of the war, before the arrival of the goods, by which the foreign consignee becomes an enemy. The same rule applies where the consignor, at whose risk the shipment was made, is a subject of the belligerent captor, the reason of the exemption being equally applicable to his case. Again, if the contract and shipment be made in time of peace, and not in contemplation of war, and the risk be laid on the neutral consignee, the property being in the consignee, not only by the rules of the civil and common law, but also by the law of nations, the goods are exempt from capture. So, also, if the consignee be a subject of the belligerent captor, for the delivery to the carrier is regarded as the delivery to the consignee, and the goods are neither enemy's goods, nor goods in unlawful trade with the enemy. Both the contract and shipment were lawfully made, and no rule of war being violated by the subject in acquiring the ownership of the property, or in their removal from the country, then friendly but now hostile, the character of the goods is not changed during the voyage, and they are, therefore, not liable to condemnation. * * *

"And, again, where the goods are shipped by an enemy consignor, during the war, and under a prior sale, or an unconditional contract of sale, the property so shipped vests absolutely in the neutral consignee, by delivery to the master, and, if otherwise innocent, and the title remains unchanged, it is exempted from capture during the voyage. The reason is obvious: the neutral violates no duties toward one belligerent by trade, otherwise lawful, with the opposing belligerent; and the only question is that of ownership, which, by the supposition, is in the neutral consignee. But, as a neutral cover is the common device by which belligerent interests are sought to be protected, shipments of this character are watched with peculiar jealousy, and the clearest evidence of ownership in the consignee is not unreasonably required. 'It is not sufficient,' says Mr. Duer, 'to establish the title, that the bills of lading and the invoice are in the name of the consignee, and express the shipment to be made on his account and risk; for these documents are indispensable to give even the *appearance* of neutral ownership. It must be shown by what means the title was acquired. If it is alleged that the goods had been paid for, the payment must be proved. If the goods are claimed under a contract of sale, containing provisions for future payment, or under an order for their shipment, the contract, or order, must be produced, and must appear to be absolute and unconditional, so as to bind the consignee positively to the acceptance of the goods, and to take from the consignor any right or power to reclaim them, (unless in the sole event of the insolvency of the consignee,) previous to their arrival. If any election is given to the consignee, or any power of direction or control is retained by the consignor, the goods continue, in the judgment of law, the property of the consignor, and, as such, are liable to capture during the voyage.' This doctrine has been clearly established by the British courts of admiralty, and affirmed by the supreme court of the United States. It may be well to illustrate this doctrine by particular cases. Thus, where an American merchant had ordered certain goods from Holland, then at war with England, and the Dutch merchant, instead of sending the goods to him directly, shipped them on his own account to a third person, and directed his correspondent not to deliver over the bill of lading unless payment was provided for in a satisfactory manner, it was held that the goods, which were captured on the voyage, remained the property of the consignor, and as such were liable to condemnation. So, where the goods were shipped under a positive order from the claimant, but the shippers, with a view to their own security, had the bill of lading altered so as to be transferable to their own order, Sir. William Scott held that the goods, being still under the dominion of the shipper, and subject to his control, the ownership was not legally changed, and upon this ground condemned the cargo as the property of the enemy shipper. * * *

"The same considerations apply where the shipment is made in time of peace by a neutral consignor who becomes an enemy before the completion of the voyage, although there does not, perhaps, exist the same grounds of suspicion as when the consignor is an enemy at the time of shipment. Nevertheless, the courts, even in this case, require the clearest evidence of neutral ownership. This is illustrated by the case of *The Frances*.[1] Shortly previous to the break-

[1] 9 Cranch, 183.

ing out of the war between Great Britain and the United States, in 1812, a merchant of Glasgow shipped several bales of goods to certain merchants in New York, and both the bill of lading and the invoice were in the names of the latter, and expressed the shipment to be on their *account and risk*. It appeared, however, by a letter found on board, that the consignor, in making the shipment, had exceeded the order, so that the consignees were in effect released from any obligation to accept the goods, and by this letter he gave them an election to take the whole of the shipment, or none, as they pleased. The goods were captured on the voyage, after war had been declared, by an American privateer, and were condemned as enemy's property. In another case of the same kind, during the same war, the bill of lading expressed the goods to be shipped by a house in Liverpool, unto and on account of certain merchants in New York, and the invoice, signed by a manufacturer in Manchester, described the goods to be consigned to the claimants, but did not specify on whose *account and risk*. And in a letter to the consignees enclosing the invoice, he said 'the goods are to be sold on joint account, or on mine alone.' The goods were accordingly condemned as the property of the shipper. * * *

"Where goods are shipped by an enemy consignor to a neutral consignee, not under a prior order, but with the expectation that they will be received on the terms proposed, if they are in fact accepted by the consignee previous to the capture, it was held, by Sir William Scott, that his acceptance vests and perfects his title, and that, upon proof of the fact, the property will be restored. To exempt the property from capture, however, the acceptance must be absolute and unconditional. The transaction is then construed in the same manner as if the goods had been originally shipped on his account and at his risk. The same point had previously been raised in the supreme court of the United States, but as the acceptance in the case decided was partial and conditional, the court expressly declined to consider what would have been the effect had the acceptance been absolute. * * *

"Every consignor, not only at common law, but by a rule of the general mercantile law, has, in certain cases, a control over the shipment, which is technically called a *right of stoppage in transitu;* that is, a right to countermand the bill of lading, and repossess himself of the goods, at any time after their shipment and before their arrival at their destined port. The only case in which this right of stoppage *in transitu* can be legally exercised, under the laws of war, is, in the expectation, confirmed by the event, of the insolvency of the consignee. If the consignee, previous to the arrival of the goods, communicate to the consignor his determination not to receive or pay for the goods, these facts are deemed equivalent to actual insolvency. But a revocation of the consignment, from fears of the insolvency of the consignee, which are not confirmed by the event, is not deemed sufficient to change the ownership. The effect of this right, when duly exercised, is to save the property from its liability to capture, where the consignment is made from a neutral to an enemy; and to incur that liability, where the consignment is made from an enemy to a neutral. * * *"

Halleck, pp. 474–481.

Sales in Transit—Special Agreements as to Ownership.

"As a general rule a neutral has a right to carry on such trade as he may choose with a belligerent. But the usages of war imply the assumption that the exercise of this right is subjected to the condition that the trade of the neutral shall not be such as to help the belligerent in prosecuting his own operations, or in escaping from the effects of those of his enemy. When neutral commerce produces this result the belligerent who suffers from the trade is allowed to put it under such restraint as may be necessary to secure his freedom of action. Hence, as private property is liable to capture at sea, and as an unlimited right of transfer from belligerent to neutral owners, irrespectively of time or place, might evidently be used as a means of preserving belligerent property from confiscation, a belligerent may refuse to recognise any transfers of property which seem to him to be made with fraudulent intent; and as a matter of fact sales of such property as is liable to capture at sea are not indiscriminately permitted." * * *

"By English and American custom all sales during war of property *in transitu* are bad, unless the transferee has actually taken possession, the probability that they are fraudulently intended being thought to be so high as to amount to a practical certainty; in the words of Lord Stowell, 'if such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect.'[1]

"Transfer *in transitu* being legitimate in time of peace, transfers effected up to the actual outbreak of war are *prima facie* valid; where however it appears from the circumstances of the case that the vendor has sold, to the knowledge of the purchaser, in contemplation of war the contract is invalidated, notwithstanding that the purchaser may have been in no way influenced in buying by a wish to assist the vendor. The transaction is held to be in principle the same as a transfer *in transitu* effected during the progress of war. 'The nature of both contracts,' says Lord Stowell, 'is identically the same, being equally to protect the property from capture in war, not indeed in either case from capture at the present moment, but from the danger of capture when it is likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are in my opinion justly subject to the same rule.'[2]

"It is the general rule that a consignor, on delivering goods ordered to the master of a ship, delivers them to him as the agent of the consignee, so that the property in them is vested in the latter from the moment of such delivery. In time of peace this rule may be departed from by special agreement, or may be changed by the custom of a particular trade, so that the property in the goods may remain in the consignor until their arrival in the port of the consignee and actual delivery to him. In time of war, however, the English and American courts, keenly alive to the opening which would be given to fraud by allowing special agreements to be made, refuse to recognise them, as between a neutral consignor and an enemy

[1] The *Vrow Margaretha*, 1 Rob., 336. [2] *Jan Frederick*, 5 Rob., 128.

consignee, whether they have been concluded during the progress of hostilities or in contemplation of them; and the breadth with which it is stated by Mr. Justice Story that in time of war 'property consigned to become the property of an enemy upon its arrival shall not be permitted to be protected by the neutrality of the shipper.'[1] may give rise to a doubt whether proof of a custom of trade varying from the common rule would be admitted to prevent property shipped by a neutral to an enemy on the conditions of the custom from being confiscated. When the consignor is an enemy, as an attempt to disguise the true character of property would take the form, not of setting up a fictitious contract, but of hiding the existence of a real one, evidence is required that the consignee is as a matter of fact the owner. It must appear that he is bound absolutely to accept the goods, and that, except in the case of his insolvency, the consignor has no power to reclaim them. French practice seems to be different."

Hall, pp. 524–528.

"The subject of the transfer of enemy goods on enemy vessels must likewise be considered as forming part of the larger subject of enemy character, for the question is here also whether such a transfer divests these goods of their enemy character. And concerning this question there was likewise no unanimous practice in existence among the maritime States before the agreement on the Declaration of London. British and American practice refused to recognise a sale *in transitu* under any circumstances or conditions, if the vessel concerned was captured before the neutral buyer had actually taken possession of the transferred goods. On the other hand, French practice recognised such a sale *in transitu*, provided it could be proved that the transaction was made *bona fide*.

"The Declaration of London now stipulates, by article 60, that enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are *in transitu*. Hence if such enemy vessel is captured before having reached her destination, goods consigned to enemy subjects may be confiscated, although they have been sold *in transitu* to subjects of neutral States. A special rule is provided for the case of the enemy consignee of goods on board an enemy vessel becoming bankrupt while the goods are *in transitu*. In a number of countries an unpaid vendor has, in the event of the bankruptcy of the buyer, a recognised legal right to recover such goods as have already become the property of the buyer, but have not yet reached him (right of stoppage *in transitu*). For this reason, article 60 of the Declaration stipulates in the second paragraph, that if, prior to the capture, the neutral consignor exercises, on the bankruptcy of the enemy consignee, his right of stoppage *in transitu*, the goods regain their neutral character and may not therefore be confiscated."

Oppenheim, vol. 2, pp. 119, 120.

The English rule in regard to stoppage *in transitu* is set forth in the following excerpts "from the judgment delivered by Lord Kingsdown on the appeal in the *Baltica*" (11 Moore P. C. 145), "namely,

[1] The *Ann Green*, 1 Galli, 274.

that 'in case of war, either actual or imminent * * * a mere transfer by documents which would be sufficient to bind the parties is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*. * * * The true ground on which the rule rests * * * is that, while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods. The difficulty of detecting frauds if mere paper transfers are held sufficient is so great, that the courts have laid down that in order to defeat the captors the possession as well as the property must be changed before the seizure. * * * The only question of law which can be raised is how long the *transitus* continues, and when and by what means it is terminated. * * * It is true that in one sense the ship and goods may be said to be *in transitu* till they have reached their original port of destination, but' for the present purpose 'the *transitus* ceases when the property has come into the actual possession of the transferee,' as it may do by the ship's calling at an intermediate port where the transferee can take possession." * * *

"We have seen that the Anglo-American rule, adopted for the purpose of checking what are described as frauds on belligerent rights, is that the enemy character of property belonging to a hostile owner cannot be divested during a voyage by transfer to a neutral owner. It is a rule of prize law, opposed to the common law which allows transfers of property *in transitu*. A similar invalidity is asserted for a transfer made before the outbreak of the war, where consequently there could be no hostile owner at its date, if 'in the clear expectation of both the contracting parties' the state to which the transferor belongs is 'likely to become a belligerent before the arrival of the property which is made the subject of their agreement.' And a further Anglo-American prize rule lays down that 'property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu* is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of a war, no such rule exists.' This rule is saved from being opposed to the common law by the principle that 'capture is considered as delivery: the captors by the rights of war stand in the place of the enemy.'

"In France the *reglement* of 26 July 1778, arts. 2 and 11, provides that the neutrality of goods can be proved only by the documents on board. Apparently this must have a similar effect to the English rule ignoring the transfer *in transitu* of enemy property to neutrals, for the documents relating to what had occurred during the voyage would not be on board. But it is said that 'goods sent by a neutral to a person of enemy nationality, with an agreement that their property shall pass to the latter only on delivery, are not subject to capture, with a reservation of the due appreciation of the frauds possible in such agreements.'

Westlake, vol. 2, pp. 171–174.

"20. * * *

(c) The character of goods carried as freight on board an enemy vessel continues as enemy goods until the arrival at destination, re-

gardless of any change of ownership during the voyage after the outbreak of hostilities.

"(d) Neutral goods may be transferred to enemy ownership during the voyage."

German Prize Rules, 1909.

Article 60 of the Declaration of London, 1909, substantially appears as Art. 47 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"If a British merchant purchase with his own funds two cargoes of goods, in consequence of but not in strict conformity with the orders of an American house, and ship them to America, giving the consignors an option within 24 hours after receipt of his letter to take or reject both cargoes, and if they give notice within the time that they will take one cargo, but will consider as to the other, this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume his property, and make them accountable for that which came to their hands; and, therefore the right of property in cargo, does not, in transitu, vest in the American house, but remains in the British subject, and is liable to condemnation, he being an enemy. The *Frances* (1815), 9 Cranch, 183. See, also, The *Frances*, 8 Cranch, 354, 358, 359; 1 Gallison, 445. See, further, as to title of property in transitu, the *Vrow Margharetha*, 1 C. Rob., 336; The *Sally*, 3 C. Rob., 300, note; The packet *De Bilboa*, 2 Rob., 133; The *Anna Catharina*, 4 C. Rob., 107; The *Jan Frederick*, 5 C. Rob., 128; The Ship *Anna Green*, 1 Gallison, 274."

Moore's Digest, vol. 7, p. 404.

"Property in transit from a belligerent to a neutral is subject to capture and condemnation, if it has not vested at the time of the capture in the neutral consignees. The *St. Jose Indiano*, 1 Wheat. 208. See, also, 2 Gallison, 268."

Moore's Digest, vol. 7, p. 405.

In a note dated April 11, 1885, Mr. Bayard, the American Secretary of State, advised the Chilean minister that: "'This Department is not disposed to deny the rule of law which forbids the transfer of an enemy's property to a neutral when on its way to the enemy's country. The leading case on this subject is that of the *Sally*, Griffiths, master, reported in the third volume of Robinson's Admiralty Reports, page 300. The case was decided against the claimants by the British House of Lords on the 12th of December, 1795. It is not easy to see how it could have been differently decided, in view of the fact that there were in evidence certain letters of Mr. Ternant, the minister of France in this country, showing that he was commissioned by his Government to purchase on its account and to forward to France the very property which was captured.'"

Moore's Digest, vol. 7, p. 405.

"With reference to an application in behalf of a German subject for the return of goods shipped by him on the Spanish steamer *Pedro*, which had been condemned, the Department of State, referring to a report of the Attorney-General, said that the goods in

question were consigned to a Spanish firm in Cuba 'without any reservations, and were consequently subject to the general rule of law that goods in the course of transportation from one place to another, if they are shipped on account and at the risk of the consignees, are considered as the goods of the latter during the voyage.' Mr. Hay, Secretary of State, to Mr. Von Holleben, German ambassador, No. 178, Jan. 18, 1899, MS. Notes to German Leg. XII. 247.

"It did not even appear by the papers in the case that there was any agreement between the consignors and consignees that the property in the goods in question should remain in the former until delivery. (Ibid.)"

Moore's Digest, vol. 7, pp. 405, 406.

In the case of the *Sally* (1795) (3 C. Rob. 300, note, Scott, 607), the court said: "It has always been the rule of the prize courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. Where the contract is made in time of peace or without any contemplation of a war, no such rule exists:—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, 'that on arrival the goods would become the property of the French Government,' and all the concealed papers strongly support him in this testimony: The *evidentia rea* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery, *capture* is considered as *delivery:* The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which Prize Courts can proceed, this cargo must be considered as enemy's property."

The *Danckebaar Africaan* (1798) (1 C. Rob. 108), was the case of a Dutch ship captured while en route from Batavia to Holland. The cargo belonged to inhabitants of the Cape of Good Hope, whose national character was changed while the goods were in transit by the surrender of that colony to the British, thus making the cargo owners British subjects.

The court held that as the vessel was captured while in transitu to a Dutch port, the goods must be condemned as Dutch property.

The case of the *Vrow Margaretha* (1799) (1 C. Rob. 336, Scott, 616), involved certain cargoes of wines that had been seized on board three Dutch vessels en route from Spain to Holland. The claimant, a Hamburg merchant, had purchased the wines after they had been shipped and while actually en route to Holland. At the time Spain and Holland were in alliance with England and at war with France.

Sir William Scott in delivering the judgment of the court, said: "The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a Prize Court, where the property is always considered to remain in the same character in which it was

shipped till the delivery. If that could be maintained there would be an end of the question, because it has been admitted that these wines were shipped as Spanish property, and that Spanish property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants,) such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu;* and in that sense I recognized it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war it must be judged according to the ordinary rules of commerce.

"It has been farther objected to the validity of this contract, that a part of the wines did actually reach Hamburgh, where they were sold, and the money was detained by the consignees in payment of the advances which they had made. It is said that this annuls the contract—to the extent of that part it may do so, and the deficiency must be made up to the purchaser by other means; but it appears that it has been actually supplied by bills of exchange, and an assignment of other wines sent to Petersburgh. It is not for me to set aside the whole contract on that partial ground, or to construe the defect in the execution of the contract so rigorously as to extend it to those wines which never went to Holland, and which never became *de facto* subject to be detained by the consignees. They are free for the contract to act upon; and if the parties are desirous of adhering to their contract in its whole extent, it does not become other persons to obstruct them.

"It comes then to a question of fact, whether it was a bona fide transfer or not? I think the time is a strong circumstance to prove the fairness of the transaction. Had it happened three months later there might have been reason to alarm the prudence of Spanish merchants, and induce them to resort to the expedient of covering their property. But at the time of the contract there seems to have been no reason for apprehension, and therefore there is nothing to raise any suspicion on that point." * * *

On the production of further proof of ownership the cargoes were ordered restored to the claimant.

In the case of the *Jan Frederick* (1804) (5 C. Rob. 128, Scott, 618), Sir William Scott said: "That a transfer [of title to goods] may take place *in transitu*, has * * * been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties. But in time of war this is prohibited as a vicious contract, being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up: for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed would use it only for sinister purposes, and with views of fraud on the rights of the belligerent.

"This, however, is not a contract made in time of war; and therefore an important question is raised, whether the *contemplation of war* would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of war, into which the speculation of war might enter, as for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense. But if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of the *Rendsborg* (4 C. Rob., 121), such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases. Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on belligerent rights, I cannot but think that the same fraud is committed against the belligerent, not, indeed as an actual belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a belligerent before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis. In other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are, in my opinion, justly subject to the same rule. * * *

"I am of opinion, therefore, that if the papers and letters which have been produced, do sufficiently establish the purpose attributed to the contract, if it is proved to have been built immediately and fundamentally on the contemplation of war, on the part of the

seller, and that it would not otherwise have fallen into the hands of the purchaser, it is an illegal contract, and must be held on every ground, on which similar contracts in time of war have been held to be invalid. * * *

"But taking it to be a *bona fide* contract, yet being formed *in transitu*, for the purpose of withdrawing the property from capture, it does intimately partake of the nature of those contracts, which have, in the repeated decisions of this, and of the Supreme Court, been pronounced null and invalid; and I pronounce this property subject to condemnation."

In *The Tobago* (1804) (5 C. Rob. 218) the court said "that a bottomry bond is subject among other things to the chances of war. While a captor takes *cum onere* of visible interests, he is not subject to secret liens on the vessel, among which may be classed bottomry bonds.

"Bottomry bonds are not entitled to be recognized in a prize court, however much the Court of Admiralty may be disposed to sanction them in the other branch of its jurisdiction."

In discussing the question of the change in title to property in transit during war, Mr. Justice Story in the *Ann Green* (1812) (1 Gall. 274, 1 Fed. Cases, No. 414) said: "The cases are, as I think, settled upon just principles, that decide that in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean. The *Vrow Margaretha*, 1 C. Rob. Adm. 336; The *Carl Walter*, 4 C. Rob. Adm. 207; The *Jan Frederick*, 5 C. Rob. Adm. 128; The *Constance*, 6 C. Rob. Adm. 321; The *Atlas*, 3 C. Rob. Adm. 299; The *Anna Catherina*, 4 C. Rob. Adm. 107. Where however the contract has been made during peace, it has received a more liberal consideration; and the case of The *Packet de Bilboa*, 2 C. Rob. Adm. 133, * * * clearly shows that the property, notwithstanding a consignment to a party, who afterwards becomes an enemy, if made at the risk of the shipper, in peace, will be protected."

The *Frances* (1815) (9 Cranch, 183): "In the ordinary course of mercantile transactions, a delivery to a ship-master is a delivery to the consignee. But it is evident that this delivery must be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is, that, in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit or with his own funds, is not acting in the ordinary capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontrolled exercise of discretion in extending it."

In the case of the *San Jose Indiano* (1814) (2 Gall. 268, affirmed in 7 Wheat. 208, Scott, 614), involving the title to a cargo shipped by an enemy merchant to his agent in Rio de Janeiro "by order and for account of" Mr. Lizaur of Brazil, Mr. Justice Story considered the question of the doctrine of stoppage *in transitu* in the following language: "As to the doctrine of stoppage *in transitu*, I do not conceive it can apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property in the goods has passed to the consignee, but that the possession is in a third person in their transit to the consignee. It cannot, therefore, touch a case, where the actual or constructive possession still remains in the shipper or his exclusive agents.

"I agree also to the position, that in general the rules of the prize court, as to the vesting of property, are the same as those of the common law, by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser. But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property, immediately on the purchase, in his principal. This is the case, when he purchases on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, sells either his own goods, or purchases goods on his own credit (and thereby in reality becomes the owner), no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not a wrongful act for him to convert them to any use, which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions in relation to the shipment. And this, I understand, not only as the general law, but as the prize law, pronounced by that high tribunal, whose decisions I am bound to obey.

"In the *Venus*, 1814, on the claim of Magee and Jones, in delivering the opinion of the court, Mr. Justice Washington observed: 'to effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale agreed to by both parties, and if the thing agreed to be purchased is to be sent by the vendor to the vendee it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master (of a ship) to many purposes is considered to be.'

"And adverting to the facts of that claim he further says: 'The delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the shipper solely, and consequently it amounted to nothing, so as to divest the property out of the shipper, until Magee should elect to take them on joint account, or to act as the agent of Jones.'"

The *San Jose Indiano* (1816) (1 Wheat., 208, syllabus): "Goods were shipped by D. B. & Co., of Liverpool, on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed 'consigned to Messrs. D. B. & F., by order and for account of J. L.' In a letter

accompanying the invoice from the shippers to the consignees, they say, 'For Mr. J. L. we open an account in our books here, and debit him, etc. We can not yet ascertain the proceeds of his hides, etc., but we find his order for goods will far exceed the amount of these shipments; therefore we consign the whole to you, that you may come to a proper understanding with him.' It was held that the goods were, during their transit, the property, and at the risk of the enemy shippers, and, therefore, subject to condemnation."

The case of the *Sally Magee* (1865) (3 Wall. 451) involved a cargo of coffee shipped from Rio de Janeiro to Richmond, Virginia, during the civil war. The vessel was captured and condemned as good prize by the lower court (Blatch. P. C. 382). The cargo was covered by four bills of lading. Three of these were given to Coleman & Co. of Rio—two for consignments to Davenport & Co. of Richmond, the third for a consignment to Dunlap & Co. of Richmond. The fourth bill of lading was to Moore & Co. of Rio for a consignment to Dunlap & Co. of Richmond.

Claims were put in by a New York firm on behalf of Coleman & Co., alleging that the latter company in sending the coffee as agents for Davenport had exceeded their authority; that Davenport refused to accept the cargo otherwise than as agents of Coleman and that they had authorized the New York claimants to receive and dispose of the cargo as such agents. This allegation was supported by an affidavit of a member of the New York firm alleging the facts as stated to be true as shown by the correspondence.

Claim to the assignment to Dunlap & Co. was made under an alleged lien, it being alleged that Dunlap & Co. were indebted to the New York claimants and had authorized them to receive the consignment and dispose of it, the proceeds to be applied to satisfying the debt. This claim was likewise substantiated by affidavit of a member of the firm and was based on correspondence.

The Supreme Court in sustaining the condemnation in the lower court said: "The bills of lading in the case are in evidence. The goods were consigned to parties living in Richmond. This vested the ownership in them. Such is the legal effect of a bill of lading as regards the consignee, unless the contrary is shown by the bill of lading itself or by extrinsic evidence."

With respect to the purported lien on the Dunlap consignment, the court said: "The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property, or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo."

In the case of the *Carlos F. Roses* (1899) (177 U. S., 655, Scott, 637) an enemy merchant vessel was captured while on a voyage to Havana,

an enemy port, with a cargo of merchandise. The cargo was claimed by a firm of neutral merchants.

The court said: "Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped 'to order for account and risk and by order of the parties noted below.' The consignees noted below in the invoice of the jerked beef were the owners of the vessel, 'the expedition or voyage of the *Carlos F. Roses*' and 'Mr. Pedro Pagés of Havana,' all Spanish subjects. The consignees of the garlic were 'Mr. Pedro Pagés' and the undersigned; that is, Gibernau and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: 'Shipped by Pla Gibernau Co. To order.' The *visé* of the consul of Spain, dated the day before, was: 'Good for Havana, with a cargo of jerked beef and garlic.' As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken 'for account of whom it may concern,' should be especially noted, since the reasonable inference is that the consignees must have been known to the master. And it also should be observed that there was no charter-party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. * * *

"The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion,—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier (Rawle's Revision), 73; *The Young Mechanic*, 2 Curtis, 404.

"Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

"In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"'The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. * * * But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. * * * But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. * * * The principal strength of the argument in favor of the claimant seemed to be rested upon the position that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs.'

"In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York, was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was

held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

"In *The Hampton*, 5 Wall. 372, the schooner *Hampton* and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed, nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overridden by the capture. Mr. Justice Miller said:

"'The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common-law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear because he would be indifferent, having the value of his property in his hand, already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts.'

"In *The Battle*, 6 Wall. 498, the steamer *Battle* and cargo were captured on the high seas as prize of war, brought into ports and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for

supplies, and another for materials furnished and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: 'The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination.'

"Such is the rule in the British prize courts. The *Tobago*, 5 C. Rob., 218; the *Marianna*, 6 C. Rob., 24; the *Ida*, Spinks Prize Cases, 26.

"The *Tobago* was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"'The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. * * * But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a court of prize? * * * The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re* until it has been converted and appropriated by the final process of a court of justice. * * * But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. * * * But it is a proposition of much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. * * * I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts.'

"In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase-money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel

was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was disallowed because the claimants' interest was not sufficient to support it; and the court said:

"'Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most creditable documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. * * * As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it can not be held to work any change in the property.'

"These cases were cited by Dr. Lushington in The *Ida* as settling the law. In that case claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien, and condemned the cargo as enemy property. Dr. Lushington referred to The *San Jose Indiano* and Cargo, 2 Gallison, 267, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

"The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers and Company of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: 'Consigned to Messrs. Dyson, Brothers and Finnie, by order and for account of J. Lizaur.' In a letter accompanying the bill of lading and invoice, Dyson, Brothers and Company wrote Dyson, Brothers and Finnie: 'For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods

will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him.' The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected although Dyson, Brothers and Company had the proceeds of his hides in their hands.

"The *Lynchburg*, Blatchford's Prize Cases, 57, and The *Amy Warwick*, 2 Sprague, 150, are cited on behalf of claimants, but, as we read them, they do not sustain their contention. The schooner *Lynchburg* with a cargo of coffee had been libelled during the civil war as enemy property, and also for an attempt to violate blockade. Brown Brothers and Company, loyal citizens, intervened as claimants of 2,045 bags of coffee, part of the cargo. They alleged that they had made an advance of credit to Maxwell, Wright and Company, neutral merchants of Rio de Janeiro, for the purchase of the coffee, under which credit Maxwell, Wright and Company drew drafts on Brown Brothers and Company for £6,000, on the condition expressed therein that the coffee purchased by claimants should be held until their advances were reimbursed thereon. It was admitted by the United States attorney that 1,541 bags of the coffee should be released to Brown Brothers and Company, and that was done. As to the remaining 504 bags embraced in the general claim of Brown Brothers and Company, in which Wortham and Company, of Virginia, asserted an interest, it was held by the court that as no proof was given by claimants that the value of 1,541 bags restored to them was not equivalent to the sum of their advances used in purchasing the whole 2,045 bags, the reasonable presumption was that the restoration satisfied the entire advance. And Judge Betts said: 'The claim to an absolute ownership of the 2,045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants upon the proposition of law that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. The *Frances*, 8 Cranch, 418; The *Tobago*, 5 C. Rob. 218; The *Marianna*, 6 C. Rob. 24. Here the vessel was an enemy bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading.' The 504 bags were condemned, 'because, by intendment of law, that portion belonged to Wortham and Company, and was not shown by the proofs to be exempt from capture as prize.'

"In The *Amy Warwick*, J. L. Phipps and Company of New York, British subjects, purchased 4,700 bags of coffee, part of the cargo of an enemy vessel, which they had purchased through Phipps Brothers and Co., their firm at Rio, with funds of an enemy firm, and

£2,000 of their own money by draft on Phipps and Co., their firm at Liverpool. They took from the master a bill of lading which stated that Phipps Brothers and Company were the shippers of this coffee, and that it was to be delivered to their order. Indorsed on the bill of lading was a statement declaring that a portion of the coffee was the property of British subjects. Phipps Brothers and Company indorsed the bill of lading over to J. L. Phipps and Co. They also delivered to the master another part of the bill of lading, an invoice of the coffee, and a letter of advice to be conveyed to the firm in New York. This letter stated that the coffee was shipped for account of merchants at Richmond, Virginia, and that a bill of lading would have been sent to them had it not been deemed advisable by reason of the unsettled state of political affairs, for the better protection of the property, and to prevent privateers from molesting the vessel, to have it certified on the bill of lading that a portion of the coffee was British property, and that this referred to the portion against which they had valued on Liverpool. It was held that the facts led plainly to the conclusion that claimants ought to be repaid the amount they had expended from their own funds in the purchase of the coffee and that the residue of the proceeds should be condemned. It was said that as the coffee was purchased at Rio by the claimants, and shipped by them on board the vessel under a bill of lading by which the master was bound to deliver it to their order, and they ordered it to be delivered to J. L. Phipps and Co., that is, to themselves, they were the legal owners of the property, and could hardly be said to have a lien upon it. Their real character was that of trustees holding the legal title and possession with a right of retention until their advances should be paid. The doctrine of liens was considered, and The *Frances*, The *Tobago*, The *Marianna* and other cases examined. Judge Sprague was of opinion that the rule in such cases ought not to be that which stops at the mere legal title, but that which ascertains and deals with the real beneficial interest, 'for, if the court were never to look beyond the legal title, the result would be that when such title is held by an enemy in trust for a neutral, the latter loses his whole property; but when the legal title is in a neutral in trust for an enemy, the property is restored to the neutral, not for his benefit, but merely as a conduit through which it is to be conveyed to the enemy. To refuse to look beyond the legal title is to close our eyes for the benefit of the enemy. It would enable him always to protect his property by simply putting it in the name of a neutral trustee.'

"We agree with counsel for the United States that, notwithstanding the indorsement of Gibernau and Company on the bills of lading, the proof of a neutral title was not sufficient. Even if when the neutral interest is adequately proven to be *bona fide*, the claim of the captors may be required to yield, yet in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt, and the assignment as a cover to an enemy interest."

A blockade is an act of war carried out by the war-ships of a belligerent detailed to prevent access to or departure from a defined part of the enemy's coast.

The above language constitutes the definition of the word "blockade" contained in the memorandum of the British Government on the points of International Law to be considered at the London Naval Conference.

British Parliamentary Papers, Misc. No. 4 (1909), (Cd. 4554), p. 5.

"Among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. Bynkershoek says, it is founded on the principles of natural reason, as well as on the usage of nations; and Grotius considers the carrying of supplies to a besieged town, or a blockaded port, as an offense exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says he may be treated as an enemy."

Kent, Vol. I, pp. 149, 150.

"Another exception to the general freedom of neutral commerce in time of war, is to be found in the trade to ports or places besieged or blockaded by one of the belligerent powers.

"The more ancient text-writers all require that the siege or blockade should actually exist, and be carried on by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. Thus Grotius forbids the carrying anything to besieged or blockaded places, '*if* it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade; as in the case of a town actually invested, or a port closely blockaded, and when a surrender or peace is already expected to take place.' And Bynkershoek, in commenting upon this passage, holds it to be 'unlawful to carry any thing, whether contraband or not, to a place thus circumstanced; since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and therefore unjust. And because it cannot be known what articles the besieged may want, the law forbids, in general terms, carrying *any thing* to them; otherwise disputes and altercations would arise to which there would be no end.'"

Wheaton, pp. 668–670.

During the Civil War in the United States the Supreme Court of the United States in the Prize Causes (2 Black) "held that the establishment of a blockade in pursuance of the law of nations, was not inconsistent with the claim of sovereign jurisdiction over the port blockaded, but was only a mode of meeting the actual and *de facto* condition of the port, as one in the possession and control of an organized belligerent power."

Wheaton, Dana's Note 153, p. 376.

"The same law which confers upon belligerents the right to capture and destroy each other's property, imposes upon neutrals the obligation not to interfere with the proper exercise of this right. Although as a general rule, neutrals may continue their accustomed trade and intercourse with either, or both of the parties to a war, there are, as already remarked, certain exceptions to this rule, established by the positive law of nations, one of which is, that the neutral shall not communicate or carry on trade with a place or post which is beseiged or blockaded. Grotius considers the carrying of supplies to a beseiged town or a blockaded port, as an offense exceedingly aggravated and injurious; Bynkershoek thinks the prohibition is founded on natural reason as well as established usage; both agree that a neutral so offending, may be severely dealt with; Vattel says that he may be treated as a public enemy. The views of these distinguished founders of international law are fully concurred in by the opinions of modern publicists, and by the prize courts of all countries. The right of a belligerent to invest the places and ports of an enemy so as to entirely exclude the commerce, (otherwise lawful,) of neutrals, during the continuance of the investment is undoubted, and, however serious the grievance, it is one to which neutral governments and their subjects are bound to submit. But as this right of the belligerent is an exception to the general rights of neutrals, and bears with great severity upon their interests, its exercise is always watched with peculiar jealousy in order to prevent its necessary evils from being aggravated by a lax construction of the laws which regulate its application."

Halleck, p. 535.

"The word blockade properly denotes obstructing the passage into or from a place on either element, but is more especially applied to naval forces preventing communication by water. Unlike siege it implies no intention to get possession of the blockaded place. With blockades by land or ordinary sieges neutrals have usually little to do. * * *

"There is a general agreement that it is unlawful for a neutral vessel knowingly to attempt to break a blockade, whether by issuing from or entering the blockaded place. Such an act, especially of ingress, tends to aid one of the belligerents in the most direct manner against the designs of the other, and is therefore a great departure from the line of neutrality. And a similar act on land would involve the loss of the most innocent articles intended for a beseiged town. M. Ortolan places the obligation to respect a blockade on the ground that there is an actual substitution of sovereignty, that is, that one belligerent has possession by occupancy of the waters of the other. But this is a formal way of defending the right of block-

ade, and may be found fault with, perhaps, for the reason that sovereignty over water along a coast is merely an incident to sovereignty on the adjoining land, which the blockader has not yet acquired. The true ground of the right is simply this, that the belligerent has a right to carry on a siege; and that his act of commencing such a seige places neutrals under an obligation not to interfere with his plans. If the sea were a common pathway to the very coast this right would still subsist."

Woolsey, pp. 342, 343.

"Blockade consists in the interception by a belligerent of access to territory or to a place which is in the possession of his enemy. As it is obviously a mode by which severe stress may be put upon the population subjected to it through the interruption of communication with the external world which it entails, it is an invariable concomitant of all warlike operations by which control is gained over avenues through which such communication takes place. * * * But at sea the rights of the neutral being equal to those of the belligerent except in so far as they are subordinated to the special needs of the latter, the neutral has *primâ facie* a right of access to the enemy; and when this right is ousted by the assertion of the special needs of the belligerent, it must be shown that the latter is in a position to render the assertion effective, the right which is set up by his needs being a bare one, like all other belligerent rights, and the conditions of maritime warfare being such that control over a space of water in which a naval force is stationed cannot be supposed to be effective as of course. Maritime blockade therefore calls for special rules defining the conditions under which it can be set up and those under which it continues to exist."

Hall, p. 718, 719.

"In considering the modern law of blockade it will conduce to clearness if we arrange it under heads. Three were given by Sir William Scott in the case of the *Betsy*, (1 C. Rob. 93), and to make the classification more complete we will add a fourth. We thus obtain, first, the essentials of a real and binding blockade, second, the proofs of knowledge of its existence on the part of supposed offenders, third, the acts which amount to violation of blockade, and fourth, the penalty for breach of blockade."

Lawrence, p. 683.

History of Blockade.

"Blockade as a systematized method of maritime warfare owes its origin to the Dutch. Grotius in 1625 hesitatingly allowed severities against those who introduced supplies into a port that was closed, when its surrender was imminent or peace was expected. The States General in 1630 went much further, and denounced the penalty of confiscation of ship and cargo against neutrals attempting to enter or leave those ports of Flanders which the Dutch fleet was blockading, or found in such circumstances as to leave no doubt of their intention to attempt ingress, or captured after egress on their return voyage. They thus barred all trade with the blockaded places, whatever the nature of the goods, and made no limitation as to an expected surrender or peace. Moreover they asserted a liberty to

capture on the high seas far away from the area under investment, if only the intention to enter or the fact of exit was proven by reasonable evidence. * * * But during the eighteenth century the courts and jurists of the leading maritime nations gradually elaborated a law of blockade. It was matter of general agreement that neutral governments must submit to the capture of their subjects' vessels and cargoes when a blockade was not merely proclaimed on paper, but maintained by an adequate force, though now and again attempts were made to exercise the right of seizure without the proper fulfilment of the condition on which it depended. Moreover the exact interpretation of that condition was often matter of dispute. On this and other questions differences arose between two schools of thought, which we may name after the protagonist on each side the English and the French. France gave voice to the prevalent opinion on the continent of Europe, and the United States adopted in practice British views. * * * The Declaration of London of 1909 has settled the questions in dispute by an equitable compromise. The most powerful maritime states of the world are parties to it and there is a confident hope that most of the other powers will give in their adhesion. The ratification of the Declaration has been delayed because of the extreme importance of constituting the International Prize Court at the same time. * * * But even without ratification there is ground for hope that the Declaration would be observed, as it was by Italy in her recent war with Turkey, since its preliminary provision declares on the part of the signatory powers that its rules 'correspond in substance with the generally recognized principles of International Law.' * * *

"By the latter half of the eighteenth century the strength of Holland at sea had decayed relatively to that of Great Britain, and from being the strongest champion of the claims of belligerents she had become an advocate of neutral rights. Great Britain, on the other hand, had inclined to a wide interpretation of belligerent privileges as her naval power increased. Neutrals complained that she exercised the right of blockade with unwarrantable severity. They accused her of sometimes sending no adequate force to support her proclamations of closure, and of constantly carrying on her blockades by cruising vessels, instead of keeping her warships, as they contended she ought, stationed before the blockaded ports. The Armed Neutralities of 1780 and 1800 dealt with the matter. They first declared that no port should be considered blockaded unless there was evident danger in entering from the proximity of a belligerent squadron, but added that the blockading vessels must be stationary. The second repeated the words of its predecessor, and placed at the end of them the further restriction that a vessel approaching the blockaded port was not liable to capture unless she had been warned of the existence of the blockade by the commander of the force maintaining it and had afterwards attempted to enter. The English government admitted that blockades must be maintained by a force sufficient to make ingress or egress difficult, but repudiated any obligation to keep their blockaders stationary or to give an individual warning to each approaching merchantman. They also claimed the right to capture at any point on the high seas vessels which could be shown to have a blockaded port as their destination with full knowledge that the blockade existed, and to make a seizure during any part

of the return voyage should a ship succeed in passing the lines of observation without being captured. In their view, as Professor Westlake tersely put it, the offence consisted not 'in passing a line of investment, but in communicating with a prohibited spot.'"

"The powers of the Armed Neutralities soon abandoned as belligerents most of the principles they had striven to enforce as neutrals, and their doctrine of blockade was thrown overboard in the general clearance, though from it eventually arose the French practice of the nineteenth century, with its insistence on individual warning, its restriction of the area within which capture is permissible to the sea covered by the operations of the blockading squadron, and its repudiation of intention as the test of guilt. * * * In the Berlin and Milan Decrees of Napoleon, and the retaliatory Orders in Council of 1806 and 1807, France and England struck wildly at each other in utter disregard of the commerce of neutral powers. Great Britain placed in the position of blockaded ports all coast towns which excluded her commercial flag, and France declared the entire coast of the British Isles to be in a state of blockade at a time when she dared not send a single squadron to sea for fear of its capture by the victorious British navy. The peace of 1815 gave an opportunity for passions to cool and reason to resume its sway over men's minds. The process of reflection removed difficulties, and in 1856 the fourth article of the Declaration of Paris gave the sanction of express consent to the generally accepted proposition that 'blockades to be binding must be effective.'"

Lawrence, pp. 675–679.

"Blockade in the modern sense of the term is an institution which could not develop until neutrality was in some form a recognized institution of the Law of Nations, and until the freedom of neutral commerce was in some form guaranteed. The institution of blockade dates from the sixteenth century, but it has taken several hundred years for the institution to reach its present condition, since, until the beginning of the nineteenth century, belligerents frequently made use of so-called paper blockades, which are no longer valid, a blockade now being binding only if effective. * * *

"Apart from the stipulation of the Declaration of Paris that a blockade to be binding must be effective, no conventional rules concerning blockade were in existence until the Declaration of London, nor was the practice of the States governed by common rules covering all the points concerned. But articles 1–21 of the Declaration of London now offer a code of the law of blockade and will, should this Declaration be ratified, in time produce a common practice of all maritime States. * * *

"As a rule a blockade is declared for the purpose of preventing ingress as well as egress. But sometimes only ingress or only egress is prevented. In such cases one speaks of 'Blockade inwards' and of 'Blockade outwards' respectively. Thus the blockade of the mouth of the Danube declared by the Allies in 1854 during the

[1] "Art. 109. It [blockade] may be instituted to prevent ingress only ('Blockade inwards'), or egress only ('Blockade outwards'), though it is generally instituted to prevent both ingress and egress. *Gerasimo*, 11 Moore, P. C. 115," Naval Prize Law, Holland.

Crimean War was a 'blockade inwards,' since the only purpose was to prevent supply reaching the Russian Army from the sea. * * *

"The question has been raised in what way blockade, which vests a belligerent with a certain jurisdiction over neutral ve sels and which has detrimental consequences for neutral trade, could be justified. Several writers, following Hautefeuille, maintain that the establishment of a blockade by a belligerent stationing a number of men-of-war so as to block the approach to the coast includes conquest of that part of the sea, and that such conquest justifies a belligerent in prohibiting ingress and egress of vessels of all nations. In contradistinction to this artificial construction of a conquest of a part of the sea, some writers try to justify blockade by the necessity of war. I think, however, no special justification of blockade is necessary at all. The fact is that the detrimental consequences of blockade to neutrals stand in the same category as the many other detrimental consequences of war to neutrals. Neither the one nor the other need be specially justified. A blockade interferes indeed with the recognised principle of the freedom of the sea, and, further, with the recognised freedom of neutral commerce. But all three have developed together, and when the freedom of the sea in time of peace and war, and, further, when the freedom of neutral commerce became generally recognised, the exceptional restrictions of blockade became at the same time recognised as legitimate."

Oppenheim, vol. 2, pp. 451, 453, 455.

History and Meaning of Blockade.

To understand the development of the theory of blockade "it must be borne in mind that the word 'blockade' originally meant 'siege by investment,' and must not, when first met with, be taken in the technical sense which has grown up along with the technical doctrine. The history commences with 1584, in which year the Dutch government issued a *placaat* declaring all the ports of Flanders then remaining in the power of Spain to be blockaded. Those ports were not many, they must at that time have all been more or less strongly fortified, and the naval power of the Dutch was already considerable. It is consequently quite intelligible that a real attack on them all may have been intended, or at least such an intention professed; and we must not assume that the term 'blockade' was used so early in any other sense than that of 'siege.' We should rather understand that the intention was to use the right of siege on an unprecedented scale. For nearly half a century the Dutch did not advance further in the particular direction thus entered on, probably because they boldly tried to prevent all commerce whatever with their enemies, but a significant development appeared in the great work of Grotius, published in 1625. After mentioning objects of use only in war and those which are of use only in peace, the former of which are declared to be always capturable, the latter never, he says about objects which are of use in both war and peace (*ancipitis usus*) that 'if the introduction of the supplies impeded me in the pursuit of my right, and this was open to the knowledge of the person who introduced them, as if I was keeping a town besieged or ports closed, and a surrender or peace was already looked for, he will be bound to repay me for the damage occasioned by his fault.'

Here the condition that a surrender or peace seems near, and the circumstance that a right of capturing objects of no use in war is not given at all, were limitations of which belligerent governments disposed to close the ports of their enemies to neutrals took no account. But the mention of the closure of ports as a distinct case from siege, operating in the opposite direction as an encouragement, was availed of with all the more freedom since Grotius had placed his opinion on the ground of the law of nature, finding, as he says, nothing settled about the matter by agreement. The need of that encouragement must have been felt by the Dutch because since 1584 Ostend had passed into the hands of the Spaniards, and England from a cobelligerent had become a neutral power, so that siege of all the Flemish enemy ports at once was not to be thought of. Within five years from the appearance of the *De jure belli ac pacis* the government obtained opinions from the admiralty of Amsterdam and, as Bynkershoek believed, from private lawyers, to the effect that 'the rule which obtains in the case of towns, which are properly said to be besieged, and which has with good reason been applied to camps, which are as it were besieged, extends also to the enemy's ports, which when invested by ships are deemed to be besieged.' On the strength of these opinions the States General in 1630 issued a *placaat* in which they announced their intention to confiscate neutral ships caught at any distance sailing for the enemy's ports in Flanders, as also those which, having broken the blockade, should be caught at any time before the completion of their voyage. This they justified by the declaration that 'their High Mightinesses keep the said ports continually blockaded by their vessels of war at an excessive charge to the state, in order to hinder all transport to and commerce with the enemy, and because those ports and places are reputed to be besieged, which has from all time been an ancient usage after the example of all kings, princes, powers and other republics, which have exercised the same right on similar occasions.' For the real absence of settled usage we may safely accept the statement of Grotius in preference to the phrases of official style asserting its existence. What is important in the *placaat* is that investment by sea takes the place of any necessity for true siege. In other words blockade as a technical institution, with its interception of all commerce and not merely of contraband goods, is officially adopted by Holland, and thenceforward stands out distinctly from the confused ideas of previous ages. That the investment should be real, as in the actual instance the *placaat* asserted it to be, the authority from which that document emanated could not take from neutrals the right to judge for themselves. If it was alleged by them not to be real, that would be a dispute between the governments concerned.

"The new institution however did not immediately find acceptance outside Holland. The Dutch government did not help to smooth the difficulty over by showing much practical moderation, for in 1652 it proclaimed a blockade of all the coasts of the British Isles, of which it would be absurd to imagine any real investment. But it was capable of adapting its course to the pursuit of diplomatic advantage, and it did not renew the *placaat* of 1630 on the occasion of its decreeing a blockade of Flanders in 1645, and in its treaty of 1646 with France, while obtaining (as it believed) the concession of the

rule 'free ships free goods,' it did not insist on the equivalence of investment to siege, but acquiesced in the confiscation of ship and cargo being denounced against those who shall have succoured or thrown men, grain or provisions into a place attacked by his majesty's armies. And this provision was substantially repeated in the Anglo-French treaty of 1655. The Franco-Spanish treaty of the Pyrenees in 1659 prohibited commerce of all kinds with towns and places 'besieged, blockaded or invested,' but added an express prohibition of French commerce with Portugal, as being a revolted province of Spain, the whole Portuguese coast being apparently regarded as too extensive for the Spanish blockade to be relied on for legally sealing it. But the Anglo-Swedish treaty of 1661, while also prohibiting the entry of all kinds of articles into besieged places, restricted the right of capturing them to cases of contraband: if goods not contraband should be carried by either party to ports or places besieged by the other, they might either be sold to the besiegers or carried away freely to ports not besieged. In the Dutch-Algerine treaty of 1662 and the Dutch-Swedish one of 1667 the prohibition of commerce with besieged places extends to contraband and articles which may tend to the convenience or assistance of the enemy, which, if not intended as a euphemism of all articles, would probably be interpreted as such by the Dutch admiralty. And this is the last which we hear of any limitation, even veiled, of the kind of commerce obnoxious to blockade. But both the treaties in question insist on the limitation of blockade to siege—the Algerine one prohibiting the commerce with 'towns actually besieged in regular form (*obsidione justa realiter cinctis*) either by sea or land, and by no means in any other case'—and the Swedish one prohibiting it with 'fortresses, towns or places having military garrisons, so long as it shall happen that they are under siege or attack by an armed force with the intention of reducing them into the power of such force, and, in respect of places situate on the coast, by land as well as by sea.' Such careful phraseology begets the suspicion that the governments and admiralties of naval powers were beginning to assume the equivalence of investment to siege with a freedom which the simple word 'siege' in a treaty could not be trusted to prevent. The new institution had indeed nearly reached its maturity, and it was finally recognised by the Anglo-Dutch treaty of 1674, the Franco-Dutch one of 1678 and the Dutch-Swedish one of 1679, in all which commerce in articles not contraband is declared to be free 'except with towns or places besieged, shut in or invested (*obsidione cinctis, circumseptis vel investitis*),' to which the first of the three adds '*Gallice, blocquees ou investies.*'

"That before the end of the seventeenth century blockade had acquired the definite meaning of a lawful exclusion of all commerce from an invested place, subject to the question of what might be a real investment, may be concluded further from the fact that, in contrast with the extravagant use of the term in 1652, it was not used in the Anglo-Dutch convention of 1689, notified by the parties to all the European powers. That document did not profess to exercise a belligerent right against neutrals but, in effect, to forbid neutrality. It dwelt on the necessity of destroying the commerce of France in order to prevent a great effusion of blood, and recited that many sovereigns

had prohibited trade with France and that others would soon prohibit it, wherefore the two allies prohibited commerce with the whole coast of France and with all French possessions in every part of the world, and announced their intention of seizing on the high seas, at any distance from France, any ship which might be found sailing for her ports. This was an extraordinary stroke of policy, and, as the *placaat* of 1599 and the similar attempt in 1793, outside law even in the ideas of those who resorted to it; and was marked as such by the separate article by which the two allies promised to aid each other in suppressing the resistance which they expected that their action would arouse. There are reasons for thinking that the interdiction so fulminated was not attempted to be enforced for more than a few months, and that the armed neutrality of 1693 was caused by other infractions of maritime law."

Westlake, vol. 2, pp. 257–262.

In the *Vrow Judith* (1799) (1 C. Rob. 150) Sir William Scott said: "With respect to the matter of blockade, I must observe that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection, and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation."

In the *Juffrow Maria Schroeder* (1800) (3 C. Rob. 148), Sir William Scott said: "A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, and preventing the egress of their fleet, as at Cadiz, or on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade; for the other is, in truth, no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, and as such not to be extended by construction; it may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit."

In the *Franciska* (1855) (10 Moore P. C., 37, 2 Roscoe, 346), it is said that the "right" of blockade "is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all trade which was open to him in time of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, viz., that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has beseiged or blockaded."

The several kinds of blockade as defined by authorities on International Law.

Simple and Governmental Blockades.

"Blockades are divided, by English and American publicists into two kinds: 1st, a simple or defacto blockade, and 2d, a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other: and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case of a governmental blockade. A simple or de facto blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arisies solely from facts, it ceases when they terminate: its existence must, therefore, in all cases, be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of state, declaring the blockade. Such notice to a neutral state is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burthen of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place; he must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which by their necessary and legal operation, raised the blockade.

Halleck, pp. 543, 544.

Paper Blockade.

A *paper* or *constructive* blockade "is one established by proclamation, without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port or ports so pretended to be blockaded." * * *

"In the course pursued by the belligerents in the wars of the French revolution and empire, and in the British orders in council and Napoleon's retaliatory decrees, an attempt was made by England and France to annul the well established rule of blockades, and to close the ports and coasts of a whole state to neutral commerce, by

simple proclamations, and without the slightest pretense of an actual blockading force. The United States constantly protested against this proceeding, and contended for the rule of international law as laid down by text-writers, that no port or coast could be regarded as blockaded without the actual presence of a sufficient force to prevent, or at least to render dangerous, any attempt of the neutral to enter. It is not necessary to here repeat the various discussions which grew out of these events, as the powers which then attempted to establish this new and absurd rule of international law, have now entirely abandoned such pretensions."

Halleck, pp. 540, 542.

Commercial and Military Blockades.

Commercial blockades are "blockades of commercial towns, not being naval stations or military posts, instituted for the purpose of merely closing them against commerce, and not as a part of warlike operations directed to the capture of the place, or its actual investment or siege. Blockades of the latter description may be called, for convenience, and in the absence of any settled term, *military or strategic blockades*." The United States during the civil war, 1861–1865, "established the largest commercial blockade ever known, and carried it out with extraordinary success. It extended from the Potomac to the Rio Grande * * * over a stretch of upwards of three thousand miles," with minor exceptions. "This vast blockade, for four years, was purely commercial. The great aid it contributed toward the diminution of the resources of the enemy, their exhaustion and final surrender, and the now generally recognized necessity for it, have doubtless been instructive to America and the rest of the world. It has shown that there may be wars in which such a blockade may be extremely useful, if not necessary. At the same time, it has shown that a blockade, commercial in its immediate action, may be a necessary part of a large system of military strategy in its more remote relations. The strategy was, to surround the entire rebel territory by sea and land, force it in upon itself, reducing its proportions and resources, and making advances into its interior, from the sea-coast or by land, at such points as should be selected. The blockade of the entire coast did not only cut off commerce and shut in the naval force of the enemy, but compelled them to maintain military forces to defend ports from possible attacks by the ships, so diverting their strength from the immediate scenes of operations by the armies.

"Although the United States, before 1861, had made efforts toward a prohibition of commercial blockades, they never questioned their legality under the law of nations." * * *

"As to the legality of commercial blockades, Napoleon assigned, as one of the defenses of his Berlin decree, that England 'extended three thousand miles," with minor exceptions. "This vast blockade, the right of blockade to unfortified cities and ports, to harbors and the mouths of rivers; while this right, according to reason and the usage of civilized nations, is only applicable to fortified places.' (Martens, tom. I, p. 439). But, in this position, Napoleon is without support. * * * The United States have recognized such blockades, and established the latest and largest."

Wheaton, Dana's Note 232, pp. 671–673. (See this note in full for a criticism of the earlier position of the United States in its opposition to the commercial blockade.)

Blockade by Obstructions.

"Parties defending a city often obstruct the approaches to it by driving piles or sinking loaded vessels in the channels. The attacking party in the possession of the approaches will often do the same, to prevent ingress and egress of hostile vessels. At the close of the war, these obstructions yield to engineering. During the war of the Revolution, the British closed, in this manner, the harbor of Savannah. There have been many such cases in European warfare; and, during the late civil war in the United States, the rebel authorities placed obstructions in many harbors, which it has since been found very difficult to remove. But the right to use these means of warfare cannot be questioned. The entire destruction of a harbor long used by the commercial world, not as a means of belligerent coercion, but as mere vindictive punishment, would doubtless furnish a proper occasion for remonstrance by neutral powers. While Charleston was besieged and blockaded, in 1861-2, the national fleet sank hulls loaded with stone, in some of the numerous approaches to that city, leaving, however, two ship-channels open. These were purely military operations in aid of the blockade, and the port itself was claimed as the lawful territory of the attacking party. Under these circumstances, an extraordinary correspondence on the subject was opened by Lord Russell. In a letter to Lord Lyons, on the 20th December, 1861, he desired him to remonstrate with Mr. Seward against this act as 'a cruel plan, seeming to imply despair of the restoration of the Union. * * * a plan which could only be adopted as a measure of revenge and of irremediable injury against an enemy.' He was further instructed to say to Mr. Seward, 'that, even as a scheme of embittered and sanguinary war, such a measure would not be justifiable. It would be a plot against the commerce of all maritime nations, and against the free intercourse of the Southern States of America with the civilized world.' (Earl Russell to Lord Lyons, Dec. 20, 1861. Same, to the Liverpool ship-owners, Jan. 15, 1862.) Whether or not Lord Lyons, in his conversation with Mr. Seward, repeated any of this ill-judged and intemperate language, no notice of it was taken by Mr. Seward, as far as appears by Lord Lyons's report to Earl Russell of Jan. 14, 1862. In that report, he simply represents Mr. Seward as referring to the limited and temporary character of the obstructions, and as remarking that 'he was not prepared to say, that, as an operation of war, it was unjustifiable to destroy permanently the harbors of the enemy; but nothing of the kind had been done on the present occasion.' Mr. Seward seems also to have reminded Lord Lyons of the course of Great Britain at Savannah, and of the acts of the rebels in several of their ports; and that, since the sinking of the vessels, British steamers, loaded with munitions of war for the rebels, had succeeded in getting in. In a letter to Mr. Adams of Feb. 17, 1862, Mr. Seward writes, 'I am not prepared to recognize the right of other nations to object to the measure of placing artificial obstructions in the channels of rivers leading to ports which have been seized by the insurgents in their attempt to overthrow this government. I am, nevertheless, desirous that the exaggerations on that subject which have been indulged abroad may be corrected.' As might be supposed, the subject was not renewed by Great Britain."

Wheaton, Dana's note No. 106, p. 429.

Stone Blockade.

During the Civil War, 1861–1865, "an experiment was made of supplementing the blockades at Charleston and Savannah by sinking stone-ships in channels of entrance into the ports. At the instance of British merchants their Government made complaints against this, as being detrimental to the general and permanent interests of commerce, to which our Secretary of State replied that the United States would regard it as a duty to remove the obstructions as soon as the Union should be restored.

"Had the United States a right to do this, or had neutrals acquired a right of access to those harbors subject only to the temporary hindrances of war? As far as the sovereign's right is concerned, it is clear that, for national preservation, measures of force within the borders of a state are not subjects of complaint from foreigners, any more than blockade or visitation on suspicion of contraband upon the water. As far as the practice of nations is concerned, we have a good instance in the obstructions at Dunkirk, which were stipulated for in the Treaty of Utrecht[1] * * *, and insisted upon in all new treaties, until the French were released from their obligations by the peace of Paris in 1783. And, in the war of 1870 between France and Germany, the Prussians blocked up, or filled with torpedoes, a large part of the harbors of northern Germany."

Woolsey, p. 295.

Paper Blockade.

These "paper or cabinet blockades, whether declarations of an intention to blockade a place without sending an adequate force thither, or the mere formality of pronouncing a tract of coast under blockade, are an undue stretch of belligerent right, and of no validity whatever." It is to be hoped that this kind of blockade has come "to a perpetual end," since the Declaration of Paris of 1856.

Woolsey, p. 344.

Pacific Blockade.

"Since the beginning of the present century [19th] what is called pacific blockade has been not infrequently used as a means of constraint short of war. The first instance occurred in 1827, when the coasts of Greece were blockaded by the English, French and Russian squadrons, while the three powers still professed to be at peace with Turkey. Other like blockades followed in rapid succession during the next few years. The Tagus was blockaded by France in 1831, New Granada by England in 1836, Mexico by France in 1838, and La Plata from 1838 to 1840 by France, and from 1845 to 1848 by France and England; the Greek ports were blockaded by England

[1] The treaty of Utrecht of 1713 between Great Britain and France contained the following clause:

"IX. The most Christian King shall take care that all the fortifications of the city of Dunkirk be razed, that the harbour be filled up, and that the sluices or moles which serve to cleanse the harbor be levelled, and that at the said King's own expense, within the space of five months after the conditions of peace are concluded and signed; that is to say, the fortifications toward the sea, within the space of two months, and those towards the land, together with the said banks, within three months; on this express condition also, that the said fortifications, harbors, moles, or sluices, be never repaired again. All which shall not, however, be begun to be ruined, till after that every thing is put into his Christian Majesty's hands, which is to be given him, instead thereof, or as an equivalent."—Jenkinson's Treaties, vol. 2, p. 33.

in 1850, and Rio de Janeiro by the same power in 1862. Since the last-mentioned year no fresh instance occurred until 1884, when France blockaded a portion of the coast of Formosa. Finally in 1886 Greece was blockaded by the fleets of Great Britain, Austria, Germany, Italy and Russia."

Hall, p. 386.

Pacific Blockade.

The conduct of pacific blockades of this character by the Powers has varied. During the Mexican blockade by France in 1838, both Mexican vessels and vessels of third Powers were seized and condemned. In the earlier cases of pacific blockade the practice had been simply to sequester vessels seeking to break the blockade, and detain them without compensation. This practice was followed by Great Britain in her Greek blockade of 1850 and again in the Greek blockade of 1886. "But the blockade of Formosa in 1884 was intended to be enforced in a very different spirit. The French government disavowed any wish to assume the character of a belligerent, but it proposed to treat neutral vessels as liable to capture and condemnation; it was anxious to retain the privilege of coaling its fleet at Hongkong, while it enjoyed the powers attendant upon a hostile blockade. Lord Granville refused to assent to conduct so inequitable towards China, and intimated that he should consider the hostilities which had in fact taken place, together with the formal notice of blockade, to constitute a state of war.

"Between blockades so different in their incidents there is little in common. With regard to those under which vessels of third powers are condemned or even sequestrated, the question arises whether a state in time of peace can endeavour to obtain redress from a second state for actual or supposed injuries by means which inflict loss and inconvenience upon other countries. In England at any rate it was soon thought not. In 1846, Lord Palmerston said in writing to Lord Normanby, the ambassador at Paris, with reference to the blockade of La Plata, 'The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a state you have no right to prevent ships of other states from communicating with the ports of that state—nay, you cannot prevent your own merchant ships from doing so. I think it important therefore, in order to legalize retrospectively the operations of the blockade, to close the matter by a formal convention of peace between the two powers and Rosas.' To this language there is nothing to add, except an expression of surprise that the subject could have ever presented itself to any mind in a different light. No state can expect another to submit to annoyance, still less to loss, for its mere convenience. It is only under the supreme necessities of war, when the gain or loss of belligerent states is wholly out of proportion to the loss inflicted upon neutral individuals, that other states can be reasonably asked to forego their right of intercourse with the enemy. If a country itself professes that its quarrel is not serious or dangerous enough to make recourse to hostilities necessary, its needs can-

not be so urgent as to justify a demand for privileges conceded only upon the ground of necessity and danger.

"The practice however assumes a very different aspect when it is so conducted as to be harmless to the interests of third powers. It is a means of constraint much milder than actual war, and therefore, if sufficient for its purpose, it is preferable in itself. It is true that its very mildness may tempt strong powers to employ it against weak countries on occasions when, if debarred from its use, they would not resort to hostilities; but it is not to be forgotten that weak countries sometimes presume upon their weakness, and that the possibility of taking measures against them less severe than war may be as much to their advantage as to that of the injured power. Moreover the circumstances of the Greek blockade of 1886 show that occasions may occur in which pacific blockade has an efficacy which no other measure would possess. The irresponsible recklessness of Greece was endangering the peace of the world: advice and threats had been proved to be useless; it was not till the material evidence of the blockade was afforded, that the Greek imagination could be impressed with the belief that the majority of the Great Powers of Europe were in earnest in their determination that war should be avoided.

"Pacific blockade, like every other practice, may be abused. But, subject to the limitation that it shall be felt only by the blockaded country, it is a convenient practice, it is a mild one in its effects even upon that country, and it may sometimes be of use as a measure of international police, when hostile action would be inappropriate and no action less stringent would be effective."

Hall, pp. 386–389.

Commercial and Military Blockades.

A Commercial blockade seeks to bar "access of innocent trade to an enemy's country" and extends its operations "beyond the area of purely military operations to all coasts which can be guarded by the fleet of the belligerent." The use of the purely military blockade is "of course fully warranted by the right of a belligerent to carry out his operations of war without being obstructed by neutrals. But according to existing usage it would be legitimate, in a war between England and the United States, for the former power to blockade the whole Californian coast, while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada. To forbid all neutral commerce, when no immediate military end is to be served, and when the effect of the measure upon the ultimate issue of the war is so slight as usually to be almost inappreciable, is to contradict in the plainest manner the elementary principle that neutrals have a right, as a general rule, to trade with the enemy. If this principle can be invaded in order that a belligerent may be subjected to a mere incidental annoyance, it is for all practical purposes non-existent. The theoretic reasoning which would justify a commercial blockade would equally justify an order, unsupported by the presence of an armed force, prohibiting neutrals from entering an enemy's port, and declaring any vessel with such destination to be a good prize. The best excuse for the usage is that the line of separation between a military and a commercial blockade

is in some cases extremely fine; and that occasionally a blockade which in its origin is of the latter character is insensibly transformed into the former. Thus the blockade of the whole coasts of the Confederated States during the American Civil War, which began by being no more than the largest commercial blockade ever instituted, was ultimately of considerable military importance, and aided directly in carrying out a plan of operations which had for its object to stifle the enemy by compression on every side.

"It may also be urged that in proportion as general maritime commerce becomes freed from liability to capture, it is necessary that a belligerent should be confirmed in the special privileges which enable him to overcome the advantages derived by his enemy from the ease and cheapness of transport by sea. Owing to the limitation of transport by land to certain lines of road, and to the cost of effecting it by indirect routes, an invasion intercepts trade over a larger area than could be generally touched by such maritime blockades as are combined with military operations. Hence wars which are carried on by land, incidentally establish blockades upon a very large scale, and among the means by which an invasion is calculated and intended to reduce an enemy, is the derangement to his foreign and internal trade which is caused by the occupation of his country. Although therefore, when this derangement is itself the sole object to which naval or military forces are directed, they are engaged in naval or military operations in so strained a sense that the manner in which a neutral is affected must be looked upon as anomolous, it is not likely that the right of maintaining commercial blockades will be readily abandoned, nor, in spite of the very serious objections which exist against them in their more extreme forms, is it quite certain that neutrals have a moral right to demand their cessation."

Hall, pp. 657–659.

Lawrence furnished the following definitions of the several kinds of blockade:

Effective blockade "is well described in the United States Naval War Code of 1900 (Art. 37) as one which is 'maintained by a force sufficient to render hazardous the ingress to or egress from a port.'"

Blockade de facto is one where an effective "force is in operation and the port is closed by it."

Blockade by notification is one where "diplomatic notice has been given that certain ports or coast-lines are under blockade."

Paper blockade is one where notification of blockade "is backed up by no force or an inadequate force," this "is in law no blockade but a lawless attempt to injure neutral trade without right."

Strategic blockade "is one which is carried on with a view to the ultimate reduction of the place blockaded."

Commercial blockade is one that "has for its object the diminution of the resources of the enemy by cutting off his external commerce."

"When a commercial blockade on a large scale is carried on with skill and efficiency, it inflicts much harm on neutrals, who are naturally inclined to be restive under it. Unbroken usage extending back for more than two centuries is amply sufficient to establish its legality; but the arguments of those who desire to see it forbidden by general consent have much force, and deserve careful consideration. In 1859 General Cass, then American Secretary of State, wrote that 'the blockade of a coast * * * with the real design of carrying

on a war against trade, and from its nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times.'[1] If we add to this the statement that in many cases the harm done by commercial blockades to neutrals is greater than the injury they inflict on the belligerent against whom they are directed, a strong case is presented. But the experience of the United States themselves shows that it may sometimes be outweighed by a stronger. Less than two years after the despatch quoted above had been written President Lincoln established the largest and most efficacious commercial blockade recorded in history. While the South had a vast seaboard and numerous ports, its territory touched but one neutral state, and that was poor and undeveloped. Little trade could come across the Mexican border; and when the fleets of the North were able to blockade effectively the entire coast of the Confederacy, few supplies from aboard could enter the country and few domestic products could go out to be exchanged for munitions of war. This isolation contributed powerfully to the triumph of the Union arms. Little blood was shed to bring it about, and yet it was more effective than many battles. Island states afford more striking illustration still. If it were possible for any power or combination of powers to blockade the coasts of Great Britain, she would be reduced to sue for peace in a few weeks from sheer hunger. On the other hand when the country whose ports are blockaded abuts on the territory of well-equipped neutral states, it would be able to obtain ample supplies by land, though at an enhanced cost. If every German port in the North Sea and the Baltic were closed, the sixty-six lines of railway which cross her frontiers would pour in all she needed. Moreover it is certain that with modern means of destruction no strongly held naval port could be hermetically sealed, though the supplies that reached it might be scanty. Nor could a commercial port in which there were well-handled submarines and torpedo craft be closed, except by the use of a very large force distributed in several cordons. While blockade may still be made into a most effective weapon in certain circumstances, in others it will be of little use, and in any case it will require, in order to be maintained on a scale sufficiently large to affect the issue of the war, a force vastly greater than was the case a century ago. No power could attempt a commercial blockade of any magnitude unless it possessed a vast number of war-ships; and the attempt would not be worth making unless there was a strong probability that its success would reduce the foe to impotence for lack of the supplies it cut off. Yet if it did succeed in such circumstances, it would decide the conflict with the minimum of slaughter and destruction. It would be a mistake to prohibit entirely the use of so humane a weapon, especially as belligerents may be trusted in their own interests not to annoy neutrals by using it unless it is almost certain to be effective. In future this condition is not often likely to be fulfilled. We may expect commercial blockades to be fewer than in the past; but when they do happen they will bring into play enormous forces and produce far-reaching effects."

Lawrence, pp. 680–683.

[1] Wheaton's International Law, 8th ed., pp. 671, 672.

Blockade by Obstructions.

"It is not necessary that channels should in every case be closed by ships, though a maritime blockade without vessels to support it would be a contradiction in terms. As an operation supplementary to those of the fleet, a waterway may be closed by stones, sunken hulls, torpedoes, or other obstructions. When, in 1861, Earl Russell remonstrated on behalf of the British Government against the attempt made by the Federal forces to block up some of the approaches to Charleston and Savannah by sinking vessels in the channels, Mr. Seward replied that the obstructions were only temporary and would be removed at the termination of the war. He also disclaimed any intention to inflict permanent injury upon 'the commerce of nations and the free intercourse of the Southern States of America with the civilized world.' But any form of closure which dispenses with ships altogether, whether it be lawful or unlawful, cannot be a blockade."

Lawrence, p. 685.

Commercial Blockades.

Commercial blockade is one "declared simply in order to cut off the coast from intercourse with the outside world, although no military operations take place on shore. That blockades commercial are, according to the present rules of International Law, as legitimate as blockades strategic, is not generally denied. But several writers maintain that blockades purely commercial ought to be abolished as not in accordance with the guaranteed freedom of neutral commerce during war."

Oppenheim, vol. 2, p. 452.

Stone Blockade.

"When in 1861, during the American Civil War, the Federal Government blocked the harbour of Charleston by sinking ships laden with stone, the question arose whether a so-called stone-blockade is lawful. There ought to be no doubt * * * that such a stone-blockade is not a blockade in the ordinary sense of the term, and that neutral ships may not be seized and confiscated for having attempted egress or ingress. But, on the other hand, there ought to be no doubt either that this mode of obstructing an enemy port is as lawful as any other means of sea warfare, provided the blocking of the harbour is made known so that neutral vessels can avoid the danger of being wrecked. See Wharton, III. sec. 361 a; Fauchille, *Blocus*, pp. 143–145; Perels, sec. 35, p. 187."

Oppenheim, vol. 2, pp. 450, 451, note.

Paper Blockade.

Paper or fictitious blockade, in contradistinction to the effective blockade provided by the Declaration of Paris and the Declaration of London," was frequently practised during the seventeenth, eighteenth, and at the beginning of the nineteenth century." It "consists in the declaration and notification that a port or a coast is blockaded without, however, posting a sufficient number of men-of-war on the spot to be really able to prevent egress and ingress of every vessel."

Oppenheim, vol. 2, p. 461.

Strategic Blockade.

Strategic blockade is one that "forms part of other military operations directed against the coast which is blockaded, or if it be declared in order to cut off supply to enemy forces on shore."

Oppenheim, vol. 2, p. 452.

Stone Blockade.

"A stone blockade, so called because vessels laden with stones are sunk in the channel to block the approach, is not an effective blockade."

Oppenheim, vol. 2, p. 463.

Commercial Blockade.

"The question of the equivalence of investment by sea to siege as conferring a right to cut off neutral commerce, of which we have traced the history, was nearly equivalent to that which has been raised in more modern times of the legitimacy of commercial blockade. Of a port neither fortified nor garrisoned but purely commercial there cannot be real siege; such a port can be occupied from the sea whenever desired. On the other hand a naval force which desires to cut off neutral commerce from a port not purely commercial can have little difficulty in giving a colour of attack to a maritime investment of it. It was in the form of an objection to commercial blockades that the question of the seventeenth century was revived in the nineteenth. In the preamble to the Berlin decree of 1806 Napoleon, with a lofty disregard of more than a century of intervening history, complained that 'Great Britain extends the right of blockade to unfortified towns and commercial ports, to harbours and the mouths of rivers, though according to right reason and the usage of all civilised nations it is only applicable to strong places.' And in 1859 President Buchanan of the United States added the abolition of commercial blockades, as a condition for adhering to the Declaration of Paris, to the immunity of private enemy property at sea which had at first been made the only condition. Secretary Cass wrote that 'the investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is required as an arbiter of national disputes. But the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times.'[1] The same view was supported in England by Cobden, but the tendency of the times has been against it, and the belligerent right of commercial blockade is well established as a part of the compromise between the exigencies of belligerents and the just claims of neutrals which has been effected by tacit international agreement. The denial of it cannot be based on any theory of neutral duty which will not set the belligerent free from any limitation of the articles which he may please to consider as contraband of war. It

[1] 3 Wharton, 373.

may be put on the alleged superiority of his exigencies, called rights, our condemnation of which has been expressed above. Or it may be put, as Hautefeuille and others have done, on a ground which applies only to one interpretation of the compromise, in connection with which I shall mention it."

Westlake, vol. 2, pp. 262–263.

Paper Blockade.

"The name 'paper blockade' properly describes any blockade which it is attempted to impose by notification without reality, but since Great Britain never attempted this without reality in her sense, the opprobrious name practically signifies want of reality in the continental sense."

Westlake, vol. 2, p. 266, note.

Blockade by Insurgents.

In a letter dated November 15, 1902, from the Secretary of State, Mr. Hay, to the Secretary of the Navy, the difference between a blockade established by a recognized government and one established by an insurgent is discussed.

Mr. Hay says: "Blockade of enemy ports is, in its strict sense, conceived to be a definite act of an internationally responsible sovereign in the exercise of a right of belligerency. Its exercise involves the successive states of, first, proclamation by a sovereign state of the purpose to enforce a blockade from an announced date. Such proclamation is entitled to respect by other sovereigns conditionally on the blockade proving effective. Second, warning of vessels approaching the blockaded port under circumstances preventing their having previous actual or presumptive knowledge of the international proclamation of blockade. Third, seizure of a vessel attempting to run the blockade. Fourth, adjudication of the question of good prize by a competent court of admiralty of the blockading sovereign.

"Insurgent 'blockade,' on the other hand, is exceptional, being a function of hostility alone, and the right it involves is that of closure of avenues by which aid may reach the enemy.

"In the case of an unrecognized insurgent, the foregoing conditions do not join. An insurgent power is not a sovereign maintaining equal relations with other sovereigns, so that an insurgent proclamation of blockade does not rest on the same footing as one issued by a recognized sovereign power. The seizure of a vessel attempting to run an insurgent blockade is not generally followed by admiralty proceedings for condemnation as good prize, and if such proceedings were nominally resorted to a decree of the condemning court would lack the title to that international respect which is due from sovereign states to the judicial act of a sovereign. The judicial power being a coordinate branch of government, recognition of the government itself is a condition precedent to the recognition of the competency of its courts and the acceptance of their judgments as internationally valid.

"To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must be considered. In point of fact, the insurgents may be in a physical position to make

war against the titular authority as effectively as one sovereign could against another. Belligerency is a more or less notorious fact of which another government, whose commercial interests are affected by its existence, may take cognizance by proclaiming neutrality toward the contending parties, but such action does not of itself alter the relations of other governments which have not taken cognizance of the existence of hostilities. Recognition of insurgent belligerency could merely imply the acquiescence by the recognizing government in the insurgent seizure of shipping flying the flag of the recognizing state. It could certainly not *create* a right on the part of the insurgents to seize the shipping of a state which has not recognized their belligerency.

"It seems important to discriminate between the claim of a belligerent to exercise *quasi* sovereign rights in accordance with the tenets of international law and the conduct of hostilities by an insurgent against the titular government.

"The formal right of the sovereign extends to acts on the high seas, while an insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is contested. To deny to an insurgent the right to prevent the enemy from receiving material aid can not well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent interference with foreign property within the theatre of insurrection, is effected at the insurgent's risk."

International law, Court Decisions and other Opinions and Precedents, Naval War College, pp. 207–209.

Blockade by Obstructions.

In a letter of July 28, 1886 (American Foreign Relations 1886, p. 95; Moore, vol. 7, p. 857) to the American minister to China, Mr. Bayard, the Secretary of State, in discussing the right of the Chinese government to block one of the channels of the Canton river to prevent the access of hostile vessels, says:—"It is unquestionable that a belligerent may, during war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerent which seeks the port either as hostile cruisers or as blockade runners. This was done by the Dutch when attacked by Spain, in the time of Philip II; by England when attacked by the Dutch, in the time of Charles II; by the United States when attacked by Great Britain, in the Revolutionary war and in the war of 1812; by the United States during the late civil war; by Russia at the siege of Sebastopol; and by Germany during the Franco-German war of 1870. But while such is the law, it is equally settled by the law of nations that when war ceases such obstructions, when impeding navigation in channels in which great ships are accustomed to pass, must be removed by the territorial authorities. Such is the rule, apart from treaty; and it was implicitly admitted by Mr. Seward, when, in replying to the remonstrances by the British Government on the placing by the blockading authorities of obstructions in the harbor of Charleston, he stated that these obstructions were placed there merely temporarily."

"During the war with Japan in 1894, the Tsung-li yamên announced the closure of Foochow for purposes of defense. One entrance was left open, and a place was designated as an anchorage for foreign and Chinese steamers outside the mouth of the river, where they were required to discharge and load cargo, which was conveyed to and from Foochow by lighters registered at the customs. These lighters followed an indicated route and plied only in the daytime. In reporting these measures the American chargé at Peking observed that, burdensome as they doubtless would prove to be, no objection could be made to them in view of the demoralization of the Chinese naval forces, Foochow being an important naval depot which must be guarded at all hazards. The Government of the United States reaffirmed the position taken by Mr. Frelinghuysen in his telegram to Mr. Young of January 22, 1884, and by Mr. Bayard, in his instructions to Mr. Denby of July 28, 1886.

"Mr. Gresham, Sec. of State, to Mr. Denby, jr., chargé at Peking, Sept. 28, 1894, MS. Inst. China, V. 95; Mr. Denby jr., to Mr. Gresham, No. 60, Oct. 9, 1894, For. Rel. 1894, Appendix I. 71."

Moore, vol. 7, p. 858.

A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.—*Article 1, Declaration of London, 1909.*

"Blockade, as an operation of war, can be directed by a belligerent only against his adversary. This very simple rule is laid down at the start, but its full scope is apparent only when it is read in connection with article 18 [of the Declaration of London]."

General report of drafting committee to London Naval Conference.

"ARTICLE 30. *Blockade.*—Ports and coasts belonging to the enemy or occupied by him may be subjected to blockade according to the regulations of international law."

Institute (1913), p. 180.

Halleck has the following criticism to offer of Hautefeuille's theory of blockades: "M. Hautefeuille considers the right of maritime blockade to result from the right of conquest, by the successful belligerent's getting military possession of an enemy's port, or of a belt of territorial sea surrounding or commanding it, precisely as he would of a belt of land around a fort in case of a siege. The conqueror, being thus in possession of a portion of an enemy's territory, may, so long as he retains that possession, extend over it his own laws and jurisdiction. He may prohibit foreigners from entering such territory, either for commerce or any other purpose, or he may permit them to enter on such terms as he may see fit to impose, precisely as he might do if it were a part of his most ancient dominion. The right of blockade, therefore, extends over only so much of the sea as is, in international law, regarded as territorial and liable to conquest, although the blockading force may be stationed outside of the territorial limit, and consequently on the high sea, which can never be subjected to local jurisdiction. In order to blockade a maritime port, or territorial sea, it is necessary that the blockading force acquire the sovereignty of it, and actually hold it in possession. This definition of a blockade gives rise to very few questions with respect to its establishment or continuance, nor can there be much dispute about what is to be regarded as a violation of it. It is a visible, material fact, and any notification of that fact would be unnecessary and superfluous, for neutrals can *see* the conqueror's possession, and readily ascertain from him whether or not they are permitted to enter, and if so, upon what terms. So long as they remain without the line of territorial jurisdiction they violate no rights of blockade. If they pass, or attempt to pass, against the will of the new sovereign, this magic line, they become liable to capture; but they must be seized while within the territorial limits, for they cannot be pursued upon the high seas, as no rights of blockade can extend beyond the sovereignty which was acquired by conquest and is continued by actual possession. We think Hautefeuille has confounded the rights of blockade with the rights of military occupation, which are not only distinct in their nature, but essentially different in their legal

consequences. Nevertheless, his views are worthy of attention, and he has maintained them with marked ability. It is not so much our object in this work to discuss theories, or to determine what the law of blockades *ought to be*, as to ascertain what that law *now is*, according to the decisions of prize courts, and the opinions of the best writers on international jurisprudence. The rules of maritime war, as now practiced, undoubtedly present some anomalies which cannot be easily reconciled with any abstract theory."

Halleck, pp. 566, 567.

"The natural inclination of belligerents to stretch their rights at sea at the expense of neutrals, appears in attempts to enlarge the extent of blockades over a tract of coast without a sufficient force; and at no time so much as at the end of the eighteenth and beginning of the nineteenth century. In the war of France and Spain with Great Britain during the American revolution, those nations extended the notion of blockade unduly, which led to the declaration of Russia in 1780,—afterwards made one of the principles of both the armed neutralities,—that the blockade of a port can exist only, 'where, through the arrangements of the power which attacks a port by means of vessels stationed there and sufficiently near, there is an evident danger in entering.'

"The far more important aggressions on neutral rights between the year 1806 and 1812, are too closely connected with the affairs of our own country to be passed over in silence. These aggressions, under the continental system, as it was called, may be traced back to measures adopted towards the close of the last century, the object of which was to cripple the commerce of England. Thus, in 1796, the ports of the ecclesiastical states and Genoa, and in 1801, those of Naples and Portugal were closed to British vessels, by special treaties with the French republic.

"In 1806, Prussia, then in vassalage to Napoleon, but at peace with England, and at the time in temporary possession of Hanover, issued a decree announcing that the ports and rivers of the North Sea were closed to English shipping, as they had been during the French occupation of Hanover. By way of retaliation, the British government gave notice to neutral powers, that the coast from the Elbe to Brest was placed in a state of blockade, of which coast the portion from Ostend to the Seine was to be considered as under the most rigorous blockade, while the remainder was open to neutral vessels not laden with enemies' goods, nor with goods contraband of war, nor guilty of a previous violation of blockade, nor sent from the ports of enemies of the British government.

"This measure led to the Berlin decree of Bonaparte, bearing the date of November 21, 1806. In this decree, issued from the capital of subjugated Prussia, after reciting the infractions of international law with which England was chargeable, the Emperor declares the British islands to be under blockade, and all commerce with them to be forbidden, English manufactures to be lawful prize, and vessels from ports of England or her colonies to be excluded from all ports, and to be liable to confiscation, if they should contravene the edict by false papers.

"The Berlin decree 'rendered every neutral vessel going from English ports with cargoes of English merchandise, or of English

origin, lawfully seizable by French armed vessels.' The British government was not slow in its retaliation. By an Order in Council, dated January 7, 1807, it was declared 'that no vessel should be permitted to sail from one port to another, both of which ports should belong to or be in the possession of France or her allies, or should be so far under their control, that British vessels might not trade thereat.' And by a second Order in Council, dated November 11, 1807, it was declared that, as the previous order had not induced the enemy to alter his measures, all places of France, her allies and her colonies, as also of states at peace with Great Britain and yet excluding her flag, should be under the same restrictions as to commerce, as if they were blockaded by British forces. All commerce in the productions of such states was pronounced illegal, and all vessels so engaged, with their cargoes, if taken, were to be adjudged lawful prize. But neutrals might trade with the colonies, or even with the ports of states thus under the ban, for goods to be consumed by themselves, provided they either started from or entered into a British port, or sailed directly from the enemies' colonies to a port of their own state. Moreover, as certain neutrals had obtained from the enemy 'certificates of origin,' so called, to the effect that the cargoes of their vessels were not of British manufacture, it was ordered that vessels, carrying such certificates, together with the part of the cargo covered by them, should be confiscated, as the prize of the captor. A supplement to this order declared that ships sold by the enemy to a neutral would be deemed illegally sold, and be considered lawful prize, while another supplement regulated the manner in which neutrals must carry on their commerce, and prescribed licenses, without which trade in certain articles would be held unlawful.

"Against these orders the French Emperor fulminated the Milan decree of December 17, 1807, declaring that every vessel which submitted to be searched by an English cruiser, or to make a voyage to England, or to pay a tax to the English government, had lost the right to its own flag, and had become English property; that such vessels falling into the hands of French cruisers, or entering French ports, would be regarded as lawful prize; and that every vessel holding communication with Great Britain or with her colonies, if taken, would be condemned.

"These arbitrary extensions of the right of war, by which neutral rights were sacrificed to the retaliation of the belligerents, were calculated to grind to pieces the few remaining neutral powers. The United States, being the principal state in this condition, made strong complaints, the disregard of which led to more positive measures. In December, 1807, an embargo was laid on commercial vessels in the ports of the United States, and in March, 1809, was passed an act prohibiting intercourse with France and England, until their restrictions on neutral commerce should be removed; which act was to continue in force towards either country, until it should revoke its obnoxious decrees.

"This led to some relaxation on the part of Great Britain. By an order in council of April 20, 1809, the ports of Holland, France, and Northern Italy, were to be placed under blockade, while the rest of the coast, embraced under previous orders, was opened to neutral commerce. Napoleon, as yet, however, relaxed his system of meas-

ures in no degree. In 1810, he ordered all British manufactures found in France to be burnt, and the same regulation extended to the states under French supremacy. This would seem to show that the prohibition of trade with England was not rigidly enforced, which was owing in part to the deficiency of the French naval force, and in part to the great demand for British manufactures and the venality of revenue officers. On the other hand, the English, being masters of the sea, were able to make their orders in council good against neutral commerce. It would seem that there was an understanding between the French government and our own, that the Berlin decree should not be put into force against our vessels.

"Such continued to be the state of things until 1812, when the French government annulled its obnoxious decrees, and the British, upon being made acquainted with the fact, rescinded their retaliatory orders, as far as concerned American goods on American vessels. This took place June the 23d,—not in time to prevent the war with Great Britain, which the United States had already begun in the same month, and a principal pretext for which was these same Orders in Council."

Woolsey, pp. 351–355.

"A blockade is not confined to a seaport, but may have effect on a roadstead or portion of a coast, or the mouth of a river. But if the river is a pathway to interior neutral territories, the passage on the stream of vessels destined for neutral soil cannot be impeded."

Woolsey, p. 342.

"The blockade is limited in its effect by its own physical imperfection. Thus, during a blockade of Holland, a vessel and cargo sent to Embden, which was in neutral territory, and issuing from that port, were not condemned."

Hall, p. 737.

"In former times it was sometimes asserted that only ports, or even only fortified ports, could be blockaded, but the practice of the States has always shown that single ports and portions of an enemy coast as well as the whole of the enemy coast may be blockaded. Thus during the American Civil War the whole of the coast of the Confederate States to the extent of about 2500 nautical miles was blockaded. And attention must be drawn to the fact, that such ports of a belligerent as are in the hands of the enemy may be the object of a blockade. Thus during the Franco-German War the French blockaded their own ports of Rouen, Dieppe, and Fecamp, which were occupied by the Germans. Article 1 of the Declaration of London indirectly sanctions the practice of the States by enacting that 'a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.'"

Oppenheim, vol. 2, p. 453.

"Where the mouth of a river divides a belligerent from a neutral state, the enemy of the former does not lose his right of blockading the shore belonging to it, but he cannot interfere with the trade of the other shore. In 1870 the French blockaded the Prussian but not the Hanoverian shore of the Ems, treating the latter as neutral from

political motives, though Hanover had been conquered by Prussia four years before. This during the American civil war was conceded as to the mouth of the Rio Grande, dividing Mexico from Texas, one of the Confederate States; 'but the Supreme Court [of the United States] laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan [water] territory, and in the case of vessels captured for being north of that line [without being driven across it by weather] refused, while restoring them, to allow their costs and expenses.' We agree with Hall that 'it is to be hoped that a rule so little consistent with the right of neutrals to uninterrupted commerce with each other will not be drawn into a precedent.'"

Westlake, vol. 2, p. 275.

"ART. 108. A Blockade to be valid must be confined to ports and coasts of the Enemy,[1] but it may be instituted of one port, or of several ports, or of the whole seaboard of the Enemy."

Naval Prize Law, Holland.

"58. The blockade must be limited to the coasts and harbors of the enemy or in his possession. * * *"

German Prize Rules, 1909.

"64. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy."

French Naval Regulations, 1912.

Article 1 of the Declaration of London substantially appears as Art. 82 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"'There has in all probability been an extensive importation of merchandise, especially contraband of war, into Matamoras, destined for the insurgent States, and an exportation of cotton from those States through the same channel. Our right to blockade the mouth of the Rio Grande, for the purpose of preventing this commerce, may be considered as at least questionable. A British steamer with a cargo of cotton has recently been captured near the mouth of that river and has been sent to New York for adjudication. In all probability this Government will ultimately have to pay heavy damages for this capture.'

"Mr. Seward, Sec. of State, to Mr. Stanton, Sec. of War, March 13, 1862, 56 MS. Dom. Let. 488."

Moore's Digest, vol. 7, p. 782.

In the case of The *Peterhoff* (1866), 5 Wall. 28, the Supreme Court considered the question of whether the proclamation of April 19, 1862, declaring "that it was intended to blockade the whole coast from the Chesapeake Bay to the Rio Grande" had the effect of establishing a valid blockade of the mouth of the Rio Grande, since by treaty of 1848 between the United States and Mexico stipulated that the navigation of the river "shall be free and common to the vessels and citizens of both countries; and neither shall, without the con-

[1] "*Francisca*, Spinks, 111."

sent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation."

The court said:—"The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It is clear, therefore, that nothing short of an express declaration by the Executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics. * * *"

"We know of no judicial precedent for extending a blockade by construction. But there are precedents of great authority the other way. We will cite one.

"The *Frau Ilsabe*[1] and her cargo were captured in 1799 for breach of the British blockade of Holland. The voyage was from Hamburg to Antwerp, and, of course, in its latter part, up the Scheldt. Condemnation of the cargo was asked on the ground that the Scheldt was blockaded by the blockade of Holland. But Sir W. Scott said, 'Antwerp is certainly no part of Holland, and, with respect to the Scheldt, it is not within the Dutch territory, but rather a coterminous river, dividing Holland from the adjacent country.' This case is the more remarkable inasmuch as Antwerp is on the right bank of the river, as is also the whole territory of Holland; and, though no part of that country was part of Flanders, then equally with Holland combined with France in a war with Great Britain, 'it was just as lawful,' as Sir W. Scott observed, 'to blockade the ports of Flanders as those of Holland,' and the Scheldt might have been included in the blockade, but he would not hold it necessarily included in the absence of an express declaration.

"This case seems to be in point.

"It is impossible to say, therefore, in the absence of an express declaration to that effect, that it was the intention of the government to blockade the mouth of the Rio Grande. And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations. * * *

"We have no hesitation, therefore, in holding that the mouth of the Rio Grande was not included in the blockade of the ports of the rebel States, and that neutral commerce with Matamoras, except in contraband, was entirely free."

In this case the vessel was released and the contraband on board was condemned as good prize.

"The *Peterhoff*. (5 Wall., 28.) Bound from Europe to Matamoras. The writer of this article has talked with a man who was on board at the time of the capture and who was positive of the finding of contraband. It was held by the court that Matamoras was not blockaded, but that the cargo was contraband and evidently intended for the Confederacy. Contraband on board condemned and vessel restored."

Albert Bushnell Hart, New York Times, Jan. 30, 1916.

[1] 4 C. Rob., 63.

In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective,—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.—*Article 2, Declaration of London, 1909.*

"The first condition necessary to render a blockade binding is that it should be effective. There has been universal agreement on this subject for a long time. As for the definition of an effective blockade, we thought that we had only to adopt the one to be found in the declaration of Paris of the 16th April, 1856, which, conventionally, binds a great number of States, and is in fact accepted by the rest."

General report of drafting committee to London Naval Conference.

"ARTICLE 4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."

Declaration of Paris of 1856.

"ART. XIII. The high contracting parties * * * hereby expressly declare that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entry of neutrals, and so stationed as to create an evident danger on their part to attempt it."

Treaty between United States and Italy, 1871. Treaties, &c., of United States, Malloy, vol. 1, p. 973.

"The law of blockade is * * * so harsh and severe in its operation, that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence * * * and the squadron allotted for the purposes of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade amounts to an entire defeasance of the measure, even though the notification of the blockade had issued from the authority of the government itself.

"A blockade must be existing in point of fact; and, in order to constitute that existence, there must be a power present to enforce it. All decrees and orders, declaring extensive coasts and whole countries in a state of blockade, without the presence of an adequate naval force to support it, are manifestly illegal and void, and have no sanction in public law. The ancient authorities all referred to a strict and actual siege or blockade. The language of Grotius is *oppidum obses-*

sum vel portus clausus, and the investing power must be able to apply its force to every point of the blockaded place, so as to render it dangerous to attempt to enter, and there is no blockade of that part where its power cannot be brought to bear. The definition of a blockade given by the convention of the Baltic powers, in 1780, and again in 1801, and by the ordinance of Congress, in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous. The government of the United States has uniformly insisted that the blockade should be effective by the presence of a competent force, stationed and present at or near the entrance of the port; and they have protested, with great energy, against the application of the right of seizure and confiscation to ineffectual or fictitious blockades."

Kent, Vol. I, pp. 150, 151.

"In the convention between Great Britain and Russia, on the 17th of June, 1801, a blockaded port was declared to be, 'that where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering.' The definition in the treaty of commerce between the United States and Chili, in May, 1832, art. 15, and the Peru-Bolivian Confederation, in May, 1838, art. 14, of the besieged or blockaded place, is, 'one actually attacked by a belligerent force, capable of preventing the entry of the neutral.'"

Note (*b*), Kent, Vol. I, 151.

"It is now a well settled principle of international jurisprudence, that a lawful maritime blockade of a port, requires the actual presence of the blockading force. A mere proclamation or notification of one belligerent, that such a port of the other belligerent will be blockaded at such a time, and thus closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of a hostile force sufficient, of itself, to make the blockade a legal one; it must not only be actually present, but it must be large enough to prevent communication, or, at least, to render it dangerous to attempt to enter the port.

* * * * * * *

"The ancient text-writers all agree, that a blockade which does not really exist, but is merely declared by proclamation, is not sufficient to render commercial intercourse unlawful on the part of neutrals. Grotius forbids the carrying of anything to 'a town actually invested, or a port closely blockaded;' and Bynkershoek evidently concurred with Grotius, in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops or a port closely blockaded by ships of war, (*oppidum obsessum*, *portus clausos*.) This is shown from his remarks upon the various decrees of the states-general. The general practice of the continental powers accorded with the opinions of these writers. In the convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law which had given rise to the armed neutrality of 1780 and 1801, the general law of nations as to what constitutes a blockade, is very correctly expressed. The third article, section fourth, of that convention, de-

clares: 'That in order to determine what characterizes a blockaded port, that denomination is given *only where there is*, by the disposition of the power which attacks it with ships stationary or sufficiently near, *an evident danger in entering*.' The same definition of a blockade is implied in the previous treaties between Great Britain and the Baltic powers, and in that of 1794, with the United States. In 1804, instructions were sent by the board of admiralty to the naval commanders and judges of the vice-admiralty courts, not to consider any blockade of the French West India islands as existing, unless in respect to particular ports which were *actually invested.*

* * * * * * *

"At the commencement of the war between the allies and Russia, in 1854, France and England declared their intention to 'maintain the right of a belligerent to prevent neutrals from breaking any *effective* blockade which may be established with an *adequate force*, against the enemy's ports, harbors, or coasts.' This declaration was a virtual concession on the part of these powerful maritime nations of the illegality of constructive or paper blockades, for which they had formerly contended; but it was regarded as defective, in not further defining what should constitute an *effective* blockade, or an *adequate* blockading force. Moreover, the declaration was in form a mere temporary order, and not as a recognized and subsisting law of nations. But the declaration of the plenipotentiaries of France, Great Britain, Russia, Austria, Prussia, Sardinia and Turkey, on the 16th of April, 1856, at the conference of Paris, removed all doubt on this point, by announcing in the fourth proposition or principle, that 'Blockades, in order to be binding, must be effective; that is to say, *maintained by a force sufficient really to prevent access to the coast of the enemy*.' This proposition was approved by the United States, and has been adopted by the other nations of Europe. There is, therefore, very little danger of its ever again being disputed as an established principle of international jurisprudence.

* * * * * * *

"A legal blockade can only exist, where its actual force can be applied; hence the legal effect of a maritime blockade, not accompanied by a military investment on land, applies only to a direct communication by sea, and to vessels sailing from, or immediately destined to, the blockaded port, and cannot be construed to prohibit the conveyance of articles, not contraband of war, to or from the blockaded port, by interior communications. A blockade can never be a complete investment of a place, unless its force can be applied to every point by which a communication may be carried on. It is true that, by this construction, a maritime blockade is usually imperfect, as a complete investment, but this imperfection arises from the nature of the force applied; it is now universally conceded that the extent of legal pretensions of a blockade, is unavoidably limited by the physical impossibility of applying ships to obstruct communications by land. The conveyance of goods through the mouth of a river under blockade, for the purpose of being shipped for exportation, is regarded as a breach of blockade, it being perfectly insignificant whether this was effected in large or small vessels. Thus, goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party

proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation."

Halleck, pp. 539, 541, 542, 546.

"Bynkershoek appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops, or a port closely blockaded by ships of war, (*oppidum obsessum, portus clausos,*) is evident from his subsequent remarks in the same chapter, upon the decrees of the States-General against those who should carry anything to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp; 'but, as to other things, whether they were or were not lawfully prohibited, depends entirely upon the circumstance of the place being besieged or not.' So, also, in commenting upon the decree of the States-General of the 26th June, 1630, declaring the ports of Flanders in a state of blockade, he states that this decree was, for sometime, not carried into execution, by the actual presence of a sufficient naval force, during which period certain neutral vessels trading to those ports were captured by the Dutch cruisers; and that part of their cargoes only which consisted of contraband articles was condemned, whilst the residue was released with the vessels. 'It has been asked,' says he, 'by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation.'"

Wheaton, pp. 670, 671.

"The definition of a lawful maritime blockade, requiring the actual presence of a maritime force, stationed at the entrance of the port, sufficiently near to prevent communication, as given by the text-writers, is confirmed by the authority of numerous modern treaties, and especially by the convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law, which had given rise to the armed neutrality of 1780 and of 1801."

Wheaton, p. 673.

"*Effective Blockades.*—During the Crimean war, the English and French Declarations of 1854 assume an 'effective blockade, which may be established with an adequate force.' The Declaration of Paris, of 1856, requires that a blockade, to be binding on neutrals, shall be 'effective,—that is to say, maintained by a force sufficient

really to prevent access to the coast of the enemy.' This definition is unscientific, and, in its literal sense, requires an impossibility. Earl Russell, in a speech of 9th March, 1857, defines an effective blockade as 'such that no vessel could with safety attempt to pass through.' Earl Granville, in the debate of May 16, 1861, says, 'Such a force as, I do not say to make it impossible, but at any rate to make it very difficult, for vessels to obtain ingress or egress;' and Lord Brougham said, a blockade must be one which 'precluded a reasonable chance of entrance.' Earl Russell, in his instructions to Lord Lyons, of Feb. 15, 1862, respecting the American blockade, says, 'Assuming * * * that a number of ships is stationed, and remains at, the entrance of a port, sufficient really to prevent access to it, or to create an evident danger of entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships have successfully escaped through it, will not of itself prevent the blockade being an effective one by international law.' See also Earl Russell to Mr. Mason, Feb. 17, 1863, where his lordship explains the language of the Declaration of Paris as not intended to require that ingress and egress should be made impossible, but as aimed at paper blockades, or nominal and practically insufficient blockades, and requiring only that the blockade be practically and reasonably effective. The Confederate authorities protested against this interpretation, but it was adhered to by the British Government. (Parliamentary Papers, 1863.)

"M. Rouher, the French Minister of Commerce, communicated to the Chamber of Commerce in September, 1861, a note from the Department of Foreign Affairs, relating to the American blockade, in which the definition is stated, 'Forces sufficient to prevent the ports being approached without exposure to a certain danger.' (Moniteur Universel, September, 1861.)

"Mr. Wheaton, in a note to Mr. Buchanan of July 1, 1846, during the Mexican war, uses the phrase, 'Forces stationed so near the ports as to render it dangerous to approach or enter them.'

"During the civil war, the United States Government recognized fully the obligation to make its blockade actual and effective; and, in its diplomatic correspondence and judicial decisions, the definitions of an effective blockade 'were satisfactory to neutrals, and substantially to the effect that the force must be sufficient to make ingress or egress by unarmed vessels sensibly dangerous; and the actual effectiveness of the blockade, wherever a case arose of a vessel captured or warned off, was never disputed by the neutral powers.' (Lord Lyons to Lord J. Russell, May 2, 1861. Same to same, May 4, 1861. Earl Russell's speech in the House of Lords, March 10, 1862. Sir R. Palmer's speech, March 7, 1862. Earl Russell to Lord Lyons, 15th February, 1862. Earl Russell to Mr. Mason, Feb. 10, 1863.)" * * *

Wheaton, p. 674, Dana's Note 233.

In regard to the meaning of the words of the original Declaration of Paris, "effectifs" and "une force suffisante pour interdire réellement l'accés," Dr. Lushington has "remarked [1] that the maintenance of a blockade must always be a question of degree,—of the degree of danger of ships going into or leaving a blockaded port. No force

could bar the entrance to an absolute certainty; vessels may get in or get out during the night or fogs or violent winds, or occasional absence; it is most difficult to judge from numbers alone. And he adds that in no case a blockade was held to be void when the blockading force was on or near the place of entry or exit. This opinion was given before the declaration of 1856. Should 'effective' have any more stringent meaning now. Probably all would concur in the opinion that the constant presence of a squadron except when gales rendered its position dangerous, constant danger of attempts to make an unlawful entrance or exit, and such a nearness of blockading vessels to one another as would render the capture or destruction of vessels seeking to escape from a port highly probable in the judgment of the commanding officer, are some of the safest criteria. The opinion, then, as to the effectiveness of a blockade has not much changed since 1856."

Woolsey, p. 344.

"A valid or lawful blockade requires the actual presence of a sufficient force of the enemy's vessels before a certain place on the coast. By presence is intended *general* presence, or presence so far as the elements do not interfere, so that the dispersion for a time of the blockading squadron by a storm, is not held to amount to its being broken up."

Woolsey, p. 343.

To establish a legitimate blockade—

"1. The belligerent must intend to institute it as a distinct and substantive measure of war, and his intention must have in some way been brought to the knowledge of the neutrals affected.

"2. It must have been initiated under sufficient authority.

"3. It must be maintained by a sufficient and properly disposed force."

Hall, 719.

The words "maintained by a force sufficient really to prevent access to the coast of the enemy" require "an impossibility if they are taken in the strictest literal sense. * * * A small boat might frequently pass in the darkness of the night through the most numerous and efficient blockading force, and thus obtain the access the prevention of which is made the test of effectiveness. It is, however, clear from the explanations given by the leading statesmen of the various countries which signed the Declaration that nothing further was intended than the assertion of the principle that there must be a real and pressing danger in any attempt to pass through. The notion that the Declaration of Paris gave the sanction of general and express consent to the doctrine of blockade advanced by the Armed Neutralities will not bear examination. No doubt it insisted, as they did, on a blockading force sufficient to constitute a real danger to would-be blockade runners, but it did not add, like them, the requirement that the units of such force should be stationary. Had it done so, it would have abolished the operation it professed to regulate. A line of vessels

[1] The *Franciska*, Spinks, 115.

anchored before a hostile port would be so easy a mark for torpedoes and submarines that after a few nights not one of them would be left. No state would risk its war-ships under such conditions. Either blockade would disappear from warfare, or, what is much more probable, the Declaration of Paris would disappear from the international statute book. Instead, it has received fresh adhesions, and is supported by an ever increasing weight of authority. And during the half-century of its existence the greatest blockade ever carried on by cruising vessels, that of the coast of the Southern Confederacy in the American Civil War, was acquiesced in by neutrals without a protest. Clearly the fourth Article of the Declaration covered blockades by unanchored cruisers, if only there were enough of them to render difficult and dangerous access to the port or coast-line they were told off to watch. It settled the question of effectiveness by permitting the British practice, which was also that of the United States, while it does not forbid observance of the requirements of the Armed Neutralities to any power that prefers to fulfil them regardless of the safety of its ships and men. It was silent as to the other matters in dispute; but the omissions which were necessary in 1856 were supplied in 1909 by the Declaration of London."

Lawrence, pp. 679, 680.

"It was one of the principles of the First and of the Second Armed Neutrality that a blockade should always be effective, but it was not till after the Napoleonic wars that this principle gradually found universal recognition. During the second half of the nineteenth century even those States which had not acceded to the Declaration of Paris did not dissent regarding the necessity for effectiveness of blockade."

Oppenheim, vol. 2, p. 461.

"One point has always been certain, namely that, whether the blockade be a commercial or a military one, there must be a real danger to the blockade-runner in crossing the line of the investment, independent of any danger which he may run of being caught earlier with the intention of crossing it, or later after having crossed it. A line which it is not in itself highly dangerous to try to pass cannot be that of an investment, nor can it affect with technical guilt either the intention to pass it formed at a distance, or the fact of its having been passed."

Westlake, vol. 2, p. 263.

"*Effectifs* in the original,[1] which means 'real,' not 'producing an effect,' as effective, which is the official translation, usually means in English. So also whenever an English writer mentions an effective blockade, he must be understood to mean a real one, that is a real investment, and not to be adding any further condition to its reality."[1]

Westlake, vol. 2, p. 264, note.

"3. Blockades in order to be binding must be effective."

Proclamation of President of United States, April 26, 1918 (30 Stat., 1771).

[1] Declaration of Paris, 1856.

"5. The following rules are to be observed with regard to neutral commerce:—* * *

"(3) A blockade, in order to be binding, must be effective, that is to say, it must be maintained by a force sufficient really to prevent access to the enemy's coast line."

Russian Imperial Order of Feb. 14, 1904, Russ.-Jap. P. C., vol 1, p. 347.

"ART. 110. A Blockade to be valid must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the Enemy, or, at any rate, to create evident danger to ships attempting ingress or egress."

Naval Prize Law, Holland.

"ART. 111. It is therefore the first duty of a Commander authorized to institute a Blockade, so to dispose his Squadron as to bring about this result. There is then in existence a Blockade *de facto*."[1]

Naval Prize Law, Holland.

"ART. 112. A Blockade, though thus validly instituted, ceases to exist if it be not effectually maintained. It will accordingly cease to exist if the blockading force—

"1. Abandon its position, unless the abandonment be merely temporary, or caused by stress of weather;[2] or

"2. Be driven away by the Enemey;[3] or

"3. Be negligent in its duty;[4] or

"4. Be partial in the execution of its duties towards one ship rather than another, or towards the ships of one nation rather than those of another."[5]

Naval Prize Law, Holland.

Article 2 of the Russian Prize Regulations, 1895, adopts the Declaration of Paris in respect to blockade.

"ART. 37. Blockades, in order to be binding, must be effective; that is, they must be maintained by a force sufficient to render hazardous the ingress to or egress from a port."

United States Naval Code, 1900.

"ART. 21. A blockade is valid when the enemy's ports, bays, or coasts are effectively closed, and when it is clearly dangerous for ships to endeavour to leave, enter, or approach them."

Japanese Regulations, 1904.

"59. To be legally binding, the blockade must be effective. * * * *"

German Prize Rules, 1909.

"66. In accordance with the Declaration of Paris a blockade, in order to be binding, must be effective, that is to say, maintained by a force sufficiently real to prevent access to the enemy coast line."

French Naval Regulations, 1912.

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[1] *Franciska*, 10 Moore P. C. 37.
[2] *Columbia*, 1 C. Rob. 154. *Nancy*, 1 Acton, 112.
[3] *Trincten*, 6 C. Rob. 65. *Hoffnung*, 6 C. Rob. 112.
[4] *Juffrow Maria Schroeder*, 3 C. Rob. 147.
[5] *Rolla*, 6 C. Rob. 364. *Fox*, Edwards, 311. Success, 1 Dod. 131. *Francisca*, Spinks, 287.

Article 2 of the Declaration of London, 1909, substantially appears as Art. 83 of the Austrian-Hungarian Rules of Maritime and Land Warfare, 1913.

The following excerpt from the instructions of the American Secretary of State, dated June 8, 1796, to the Minister at London, is quoted in Vol. 7, Moore's Digest, p. 788:

"'To a country whose principal exports are, and for a long period will be, the various articles of provisions, it is essential to obtain an entire exemption from restraint in their exportation, except to a blockaded place. And to guard against the abusive extension of the term blockade, it will be necessary explicitly to describe its meaning, and to confine it, as in the declaration of the armed neutrality, "to a port where, by the disposition of the power which attacks it, with vessels stationed sufficiently near, there would be evident danger to enter it."'"

The following excerpt from the instructions, dated September 20, 1800, of the American Secretary of State to the Minister at London is quoted in Vol. 7, Moore's Digest, p. 788:—

"'Ports not effectually blockaded by a force capable of completely investing them, have yet been declared in a state of blockade. * * * If the effectiveness of the blockade be dispensed with, then every port of the belligerent powers may at all times be declared in that state, and the commerce of neutrals be thereby subjected to universal capture. But, if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the belligerent, and, of consequence, the mischief to neutral commerce can not be very extensive. It is, therefore, of the last importance to neutrals that this principle be maintained unimpaired. I observe that you have pressed this reasoning on the British minister, who replies that an occasional absence of a fleet from a blockaded port ought not to change the state of the place. Whatever force this observation may be entitled to, where that occasional absence has been produced by an accident, as a storm, which for a moment blows off the fleet and forces it from its station, which station it immediately resumes, I am persuaded, that where a part of the fleet is applied, though only for a time, to other objects, or comes into port, the very principle requiring an effective blockade, which is, that the mischief can only be coextensive with the naval force of the belligerent, requires that, during such temporary absence, the commerce to the neutrals to the place should be free.'"

"Referring to the blockade by the United States naval forces of the west coast of Mexico in 1846, Mr. Buchanan, as Secretary of State, in a note to Mr. Pakenham, British minister, of December 29, 1846, said: 'It is as yet sufficiently apparent from the whole proclamation [of Commodore Stockton] that he did not intend to establish a paper blockade. This would have been equally unwarranted by his instructions and by the principles which the United States have maintained in regard to blockades ever since we became an independent nation.' In a circular from Mr. Mason, Secretary of the Navy, of December 24, to the commanding officers of the United States Navy in the Pacific, it is said that 'a lawful maritime blockade re-

quires the actual presence of a sufficient force stationed at the entrance of the ports sufficiently near to prevent communication. The only exception to this rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the operation of a blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade. The United States have at all times maintained these principles on the subject of blockade; and you will take care not to attempt the application of penalties for a breach of blockade, except in cases where your right is justified by these rules. You should give public notice, that under Commodore Stockton's general notification no port on the west coast of Mexico is regarded as blockaded unless there is a sufficient American force to maintain it, actually present, or temporarily driven from such actual presence by stress of weather, intending to return.'

"37 Br. & For. State Papers, 565 et seq."[1]

Moore's Digest, vol. 7, pp. 790, 791.

Earl Russell in a communication dated Feb. 10, 1863, to Mr. Mason wrote as follows: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as the occasional appearance of a man-of-war in the offing, or the like. * * * The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. * * * It is proper to add, that the same view of the meaning and effect of the Articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James' (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration."

Vol. 55, British State Papers, p. 737.

"If on August 17, 1866, President Johnson declared null and void the imperial decree of July 9 declaring the blockade of Matamoras, it was indeed only because 'the said decree, in declaring a belligerent blockade not maintained by effective military or naval forces violated the neutral right of the United States.' (Archiv. Dip., 1866, IV. 276.)"

Moore's Digest, vol. 7, p. 786.

The following excerpts from a letter, dated April 24, 1885, from the American Secretary of State to the Columbian Minister, in which the attitude of the United States in regard to the necessity of a blockade being effective is recapitulated, are quoted in Vol. 7, Moore's Digest, pp. 812, 813:—

"'As early as April 24, 1861, when Mr. Lincoln's administration had only been in office six weeks, but when it was already apparent

[1] Also 55 British State Papers, pp. 660, 661.

that the secession movement then begun would speedily have possession of most of the ports of the Southern States. Mr. Seward addressed a circular to the ministers of the United States in Europe, in which he declared the adhesion of the United States Government to the rule that "blockades, in order to be binding, must be effective; that is to say, maintained by forces sufficient really to prevent access to the coast of the enemy." (United States Diplomatic Correspondence, 1861, p. 34.)

"'When President Lincoln proclaimed, as he did on the inception of the civil war, a blockade of the Southern coast, the proclamation was followed by an announcement to France and to England that the blockade would be effective in the above sense; and it is important to observe that, enormous as were the profits to be gained by blockade running and doubtful as was at least the friendliness of certain European courts toward the United States, not one of the maritime powers of Europe complained that the blockade was not effective.

"'Congress, it is true, adopted a few weeks later a municipal statute, as hereinbefore stated, authorizing the President, at his discretion, to close the Southern ports; but as to this measure the following observations are to be made: (a) The closure was to be a domestic act, incidental to the blockade, the permanency of which as a general measure during the civil war the President had already announced to foreign sovereigns. (b) It was to be effected in part by land forces. (c) Its institution was conditional upon the discretion of the President, which discretion was never exercised.

"'It is as thus qualified and explained that Mr. Seward refers, in his correspondence with Mr. Adams and Lord Lyons, to the statutes in question, but it is impossible not to see, in Mr. Seward's references, a latent appeal of great force against the action of those European powers which, at the beginning of this century, did not hesitate to convulse and devastate the world by decrees and orders in council closing ports they did not possess. They did this in the face of vehement and almost supplicatory remonstrances from the United States, and forced this Government, then young in the family of sovereignties, and naturally desirous of peace with all, most reluctantly and at great cost of blood and treasure to undertake, as at last the sole maritime contestant, wars against Great Britain and France to maintain the freedom of the seas and the invalidity of paper blockades.

"'With this unimpeachable record behind us, no tangible objection could be made to the validity of a blockade which was effective enough to keep off multitudes of the most skillful navigators of those countries from the Southern ports of the United States, and the appeal had its immediate and inevitable effect. Great Britain and France, on the one hand, ceased to contest the validity and efficiency of the blockade of the Southern ports, and united, on the other hand, in the most solemn repudiation of the position formerly taken by them, that a belligerent can, by mere decree, give binding international effect to the asserted closure of a port he does not hold. And that ports not so possessed can not be closed, even by their legitimate sovereign, without the concomitant of a duly announced and effective blockade, may be accepted as now an established rule of international law.'"

"Early in the civil war in Chile, in 1891, the Congressional deputation on the insurgent fleet notified the Government authorities and the foreign representatives that Iquique and Valparaiso would be blockaded on February 1, 1891. Protests against the institution of blockades by the insurgents were made by the consular bodies at both those ports. The British Government, however, stated, January 24, 1891, that, if an 'effective blockade' should exist, 'escort through it can not be given.' In reality neither port was ever blockaded."

Moore's Digest, vol 7, p. 788.

"November 1, 1899, the United States minister in Venezuela reported that Puerto Cabello was 'formally and probably effectively blockaded by Castro government,' a de facto organization which assumed power at Caracas October 23, 1899. He inquired whether recognition of the blockade would not imply recognition of the de facto government, which was 'fairly well established.' The Department of State replied: 'If closure by the de facto government is supported by effective blockade, it must be respected by all United States merchant vessels.'"

Moore's Digest, vol. 7, p. 786.

In the *Juffrow Maria Schroeder* (1800) (3 C. Rob. 147), Sir William Scott said:—"What is a blockade, but to prevent access by force? If the ships stationed on the spot to keep up the blockade will not use their force for that purpose, it is impossible for a court of justice to say, there was a blockade actually existing at that time, so as to bind this vessel. Then, the only ground, on which she could be affected, would be, that the whole voyage was criminal, from the time of sailing from Bordeaux, without any reference to the conduct of the blockading force. In opposition to that, I am to consider that the ship was not coming from her own port; she had been some time absent from her own country; she had been in our ports, where it is possible, the notification might not have reached her; she afterwards went to Bordeaux. During the time necessarily employed in two such voyages, if the master had been accidentally informed of the blockade before, it would be a little hard to say that he might not entertain a conjecture, that the blockade had ceased. I fear that alone would not avail him; but coupling it with the fact that no force appeared to prevent him from going in, it would be a little rigorous to bind down the strict principle of law on him. I think these circumstances bring the case within the principle of the *Neptunus* [2 C. Rob. 110], in which it appeared, that the ship sailed with an intention of breaking the blockade of Havre, or rather under the chance of finding that the blockade had ceased. She met with Admiral Duncan's fleet, and was informed that Havre was open; and the court held that after that permission, she was not to be considered as taken *in delicto*. In the present case, the ship was permitted to go in with a cargo and looking at the facts that she came from the south of Europe, and that she was actually permitted to enter, I think she brings herself within the scope of the favorable considerations applied to that former case. It is impossible for me to say this, without observing at the same time, on the great mischief that ensues from this sort of inattention practiced by our cruisers. It is in vain for

governments to impose blockades, if those employed on that service will not enforce them. The inconvenience is very great, and spreads far beyond the individual case; reports are eagerly circulated, that the blockade is raised; foreigners take advantage of the information; the property of innocent persons is ensnared, and the honor of our own country is involved in the mistake."

In the *Franciska* (1855) (Spinks P. C., 115), Dr. Lushington said:—"The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention nor indeed more opposed to my notions of the Law of Nations than any relaxation of the rule, that a blockade must be sufficiently maintained; but it is perfectly obvious, that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence I believe that in every case the enquiry has been, whether the force was competent and present, and if so, the performance of the duty was presumed; and I think I may safely assert, that in no case was a blockade held to be void, when the blockading force was on the spot or near thereto, on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blocking squadron."

The *Andromeda* (1864) (2 Wall. 481): "A blockade, once regularly proclaimed and established, will not be held to be ineffective by continual entries in the log-book, supported by testimony of officers of the vessel seized, that, the weather being clear, no blockading vessels were to be seen off the port from which the vessel sailed."

The *Peterhoff* (1866) (5 Wall., 28, 50):—"It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands. It was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is nowhere more fully recognized than in our own country, though not a party to that declaration."

The question whether a blockade is effective is a question of fact.—*Article 3, Declaration of London, 1909.*

"It is easily to be understood that difficulties often arise on the question whether a blockade is effective or not; opposing interests are at stake. The blockading belligerent wishes to economize his efforts, and neutrals desire their trade to be as little hampered as possible. Diplomatic protests have sometimes been made on this subject. The point may be a delicate one, because no absolute rule can be laid down as to the number and position of the blockading ships. All depends on matters of fact and geographical conditions. In one case a single ship will suffice to blockade a port as effectively as possible, whereas in another a whole fleet may not be enough really to prevent access to one or more ports declared to be blockaded. It is therefore essentially a question of fact, to be decided on the merits of each case, and not according to a formula drawn up beforehand. Who shall decide it? The judicial authority. This will be, in the first place, the national tribunal which is called on to pronounce as to the validity of the prize and which the vessel captured for breach of blockade can ask to declare the capture void, because the blockade, not being effective, was not binding. This resort has always existed; it may not always have given satisfaction to the powers concerned, because they may have thought that the national tribunal was rather naturally led to consider effective the blockade declared to be so by its government. But when the international prize court convention comes into force there will be an absolutely impartial tribunal, to which neutrals may apply, and which will decide whether, in a given case, the blockade was effective or not. The possibility of this resort, besides allowing certain injustices to be redressed, will most likely have a preventive effect, in that a government will take care to establish its blockades in such a way that their effect can not be annulled by decisions which would inflict on it a heavy loss. The full scope of article 3 is thus seen when it is understood that the question with which it deals must be settled by a court. The foregoing explanation is inserted in the report at the request of the committee, in order to remove all possibility of misunderstanding."

General report of drafting committee to London Naval Conference.

"20. By a declaration of blockade, the blockading Power forbids access to the blockaded coast, and the Declaration of Paris accordingly makes the recognition of a state of blockade dependent on the effectiveness with which such access is prevented. So much is common ground. It is in respect to the means by which it is sought to prevent access that a divergence seems to exist between the English and the continental points of view. There has been a wide-

spread impression that the opposing views are totally irreconcilable, but a careful and systematic examination of all reported British cases has convinced His Majesty's Government that the divergence is the result not so much of differing practices as of theories constructed by jurists in order to justify the executive measures adopted by belligerents, and of deductions somewhat hastily drawn from the language employed in the decisions of the Prize Courts. Obviously, were actual attainment to the blockaded coast to be alone recognised as the offence which justified capture, the maintenance of a blockade would become impossible. Consequently, some other ground for capture must be admitted. Under the system practised by the continental nations a 'line of blockade' is created, and the offence is defined as the act of crossing this line. According to the English definition, the offence consists in the *attempt* to reach the blockaded coast, and it has been laid down that the act of sailing towards that coast with the intention of reaching it constitutes an attempt. Against the former system it has been urged that the line of blockade is purely arbitrary and bears no fixed relation to the coast blockaded, while the latter system has been characterized as an endeavour to attach penal consequences to what is only an intention. In truth, both systems are to some extent arbitrary, but this is the unavoidable result of the impossibility of maintaining a blockade without resort to some such method of procedure. In course of time these systems appear to have become stereotyped by jurists to such an extent that the reasons for their existence and the practices from which they were deduced have been lost sight of, with the result that claims have from time to time been put forward by the advocates of either system which have met with serious opposition, and which are probably quite unwarranted. For instance, it has been said on the one side that a ship is liable to capture the moment she has left her port of departure, however far she may be from the blockaded coast; while, on the other, it has been maintained that a ship cannot be captured at any point unless the blockade is 'effective at that point,' that is to say, only when she is in the act of crossing a line which is itself effectively guarded. To adopt the former view is to prohibit a ship from starting with the blockaded port as an alternative destination, which may be abandoned if, on approaching the neighbourhood of that port, she should ascertain that it is still blockaded. To adopt the latter view is to throw on the blockading force the onus of covering some line other, and probably much more extended, than the blockaded coast, although it is only actual access to that coast which need be prevented in order to make the blockade effective.

"21. To turn from theory to practice: In order that blockade runners may be effectively stopped, there must, among other things, be an arrangement by which they are prevented from slipping by under cover of darkness. This implies such a disposal of the blockading squadrons as to insure that a vessel attempting to break the blockade would have to pass either outer or inner lines or groups of blockading ships in the daytime. Whilst in this way the several lines together could make the blockade effective, it might quite possibly be said that no one line alone constituted an effective guard at the spot where it was stationed. In such circumstances the theoretical rule

that no ship of the blockading fleet can properly effect a capture unless the blockade is effective at the point where the ship is stationed, in other words, unless vessels which may pass it at any time would almost certainly be stopped, clearly becomes impossible of execution. As regards the practical application of the other system, an attentive examination of all the reported cases in the British prize courts relative to questions of blockade has shown that, while the principle of liability to seizure at any point of a voyage to or from a blockaded port or coast has been maintained in theory, there is, in fact, no such case in which a vessel has been condemned for breach of blockade except when actually close to, or directly approaching, the blockaded port or coast. The possibility of change of destination and other circumstances have always been taken into consideration, with the result that, except in cases which admitted of no doubt as to the immediate intentions of the vessel, she has invariably been released. Thus, in practice, the British courts have acted on a rule which closely approximates to that upheld by continental Governments if freed from the impracticable interpretations and deductions with which the latter has been overlaid by an extreme school of jurists. It therefore appears to His Majesty's Government that it ought not to be impossible to give suitable expression to the common principle."

Instructions, Dec. 1, 1908, from Sir Edward Gray to Lord Desart, British delegate to the London Conference. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), pp. 25, 26.

"3. A blockade is effective when it results in preventing access to the blockaded port by means of a sufficient number of war vessels stationed there, or absent from such station only temporarily. * * *"

Institute (1877), p. 15.

"Article 35. A blockade which has been declared and notice thereof given is effective when there exists a real danger in entering or leaving a blockaded port, because of the fact that a sufficient number of war vessels are stationed there, or are but temporarily absent from such station."

Institute (1882), p. 52.

"Where the blockading squadron is driven away from its station by a superior force of the enemy, the interruption operates as a legal discontinuance of the blockade, and on its renewal, the same measures are necessary to bring it to the knowledge of neutrals, either by public declaration or by the notoriety of the fact, as were legally requisite when it was first established. It is, in effect, a new blockade, and not the continuance of the old one. The reason of this is obvious. The raising of the blockade by a superior force of the enemy, effects a material change in the relative circumstances of the war, and a new course of events arises which may lead the government to make a very different disposition of its blockading force. It, therefore, introduces a new and different train of presumptions, in favor of the ordinary freedom of commercial intercourse.

"A blockade is dissolved by the removal of the blockading force for a different service, although the removal should be a temporary one. Even where only a portion of the force is ordered away, the

legal effect is the same, unless the force that is left is competent, by itself, to maintain and enforce the blockade, by its ability to prevent all communications. But the blockade is not considered as raised where some of the passes of communications are left unguarded and open by the temporary absence of some of the ships in chasing suspicious vessels which had approached the blockaded port; for the service in which such ships are employed is a necessary part of the duty they are appointed to perform, and their absence is justly regarded as accidental, like that produced by stress of weather; they, however, are bound to resume their station with due diligence, as otherwise their prolonged absence would lead to the inference that they had been detached as cruisers, and the blockade be considered as suspended."

Halleck, pp. 544, 545.

"What a *sufficient force* is, cannot be determined with logical rigor. It may be said to be such a force as will involve a vessel attempting to pass the line of blockade in considerable danger of being taken.

"Treaties have sometimes determined the amount of force necessary to make a blockade valid. Thus, a treaty of 1742 between France and Denmark declares that the entry of a port to be blockaded must be closed by at least two vessels, or by a battery of cannons placed on the coast, in such sort that vessels cannot get in without manifest danger. A treaty of 1753 between Holland and the Two Sicilies requires the presence of at least six vessels of war, at the distance of a little more than cannon-shot from the place, or the existence of batteries raised on the coast, such that entrance cannot be effected without passing under the besieger's guns. A treaty of 1818 between Russia and Denmark repeats in substance the provisions of the first named treaty."

Woolsey, p. 343, 344.

"'To agree to perform a duty effectively is a very different thing from agreeing to perform it absolutely; the latter engagement is a guarantee, the former is an engagement to perform the duty unless *casus* intervene. A carrier, for instance, does not insure against a sudden frost which a prudent person could not forsee, nor against peculiar and extraordinary storms; nor even against defective performance by employés, when this defectiveness arises from extraordinary interferences not to be prognosticated. And so it is with blockades. A blockade to be effective need not be perfect. It is not necessary that the beleagured port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade-runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade-runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to *casus* or some rare and exceptional negligence, but to a general laxity or want of efficiency—then such blockade is not valid.'

"Wharton, Com. Am. Law, Sec. 233, pp. 332."

Moore's Digest, vol. 7, pp. 796, 797.

The doctrine of blockade as laid down by the decisions of the English and American courts, "requires that a place shall be 'watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable.'

"Provided access is in fact interdicted, the distance at which the blockading force may be stationed from the closed port is immaterial." In the blockade of Buenos Ayres the blockading vessels were stationed at Montevideo. During the Crimean War the port of Riga was blockaded by a vessel stationed at "Lyser Ort, a channel three miles wide, which forms the only navigable entrance to the gulf" and which is 120 miles from the town.

"It is impossible to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the Prize Courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition. In some cases, where a blockading squadron, from the nature of the channels leading to a port, can be eluded with ease, a large number of successful evasions may be insufficient to destroy the legal efficiency of the blockade. Thus during the American Civil War, the blockade of Charleston was usually maintained by several ships, of which one lay off the bar between the two principal channels of entrance, while two or three others cruised outside within signalling distance. This amount and disposition of force seem to have been thought by the British government amply sufficient to create the degree of risk necessary under the English view of international law, although from the peculiar nature of the coast a large number of vessels succeeded in getting out and in during the whole continuance of the blockade.

" * * * the blockade ceases if an enemy's force succeeds, for however short a time, in driving off the squardon which is charged with maintaining it, or if vessels are diverted to other employment; and if a prize is pursued so far from the blockading station that a neutral ship on arriving near the entrance may fairly think that the blockade is abandoned, it may be held to be at least so far impaired that the neutral so attempting to enter is relieved from the natural penalty of his act.

"The opinions held by the majority of modern continental writers as to the conditions under which a blockade is efficiently maintained, differ in several important respects from the principles which guide the practice of England and the United States. They may perhaps be summarized as follows. The immediate entrance to a port must be guarded by stationary vessels, in such number as either to render entrance impossible, or at least to expose any ships running in to a cross fire from the guns of two of them. Any accidental circumstance which makes it temporarily possible to go in puts an end to the blockade, and justifies a vessel in attempting to enter. As, for three quarters of a century, by far the most extensive experience in blockades has fallen to the share of England and the United States, these opinions, whatever their abstract merits, labour under the disadvantage of being inconsistent with the most authoritative usage

upon the subject. They are also much more rigid than the principles embodied in the Declaration of Paris, and accepted by the great majority of civilized nations. It is hardly necessary therefore to inquire upon what grounds they are stated to represent existing law. The signatary powers of the Declaration of Paris, which is perfectly in harmony with English doctrine, were satisfied with declaring that 'blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.'

"It may be remarked, apart from reference to existing law, and apart also from all questions whether blockades ought to be permitted at every place where they are now lawful, that the experience of the civil war in America has proved the use of steam to assist so powerfully in their evasion, as to render it unwise to shackle the belligerent with too severe restrictions. If it is wished altogether to deprive blockades of efficacy, it would be franker and better to propose to sweep them away altogether."

Hall, 725–730.

"A few treaties contain stipulations in agreement with the views of the foreign writers whom I have quoted. I am not aware that any blockade has ever been conducted under their provisions. In 1742 France and Denmark agreed that a blockaded port should be closed by two vessels at least, or by a battery of guns on land, and the same stipulation was made between Denmark and Genoa in 1789. The treaty between Holland and the Two Sicilies in 1753 prescribes that at least six ships of war shall be ranged at a distance slightly greater than gun-shot from the entrance, or else that the blockade may be maintained by shore batteries and other works. The First Armed Neutrality, in 1780, laid down that blockade must be effected with vessels stationary and sufficiently near to produce evident danger in entering. The Second Armed Neutrality put forward the same doctrine; but Russia, in her treaty with England in 1801, consented to substitute the words 'arrêtés ou suffisamment proches," for 'arrêtés et suffisamment proches;' and the only treaty since concluded in which stringent stipulations are made is that between Denmark and Prussia in 1818, by which it was required that two vessels should be stationed before every blockaded port."

Hall, Note 1, p. 729.

"All International Law requires is that the attempt to run in or out shall be attended by manifest and pressing danger. Moreover, the vessels engaged in maintaining a blockade need not be stationed in close proximity to the port they close. The conformation of the coast, the nature of the channels, the set of the currents, and the neutral or belligerent character of the sovereignty exercised over the adjoining territory, are all elements in determining the position of the blockaders. In the Crimean War, the port of Riga was blockaded by a singe British vessel, stationed a hundred and twenty miles from the town in a narrow channel which formed the only navigable approach to the place." In the case of the capture of the *Olinde Rodriguez* (174 U. S. 510), the United States Supreme Court held "that one cruiser was enough to maintain an effective blockade of the port of San Juan in Porto Rico, though it released the captured

vessel on the ground that an intent to enter was not proved against her. It also laid down that effectiveness was a matter 'more of fact than of law,' thus anticipating the second Article of the Declaration of London, which declared that 'the question whether a blockade is effective is a question of fact,' and left it for the courts to decide."

Lawrence, p. 684.

"A legal blockade involves the continual presence off the blockaded port of a force sufficient to make ingress and egress very dangerous. Unless it is effective, neutral governments are not bound to submit to the seizure of their merchantmen attempting to run in or out. But under modern conditions of navigation and warfare the endeavour to make it effective is far more dangerous to the blockaders than to the blockaded, whenever there is in the port a force of torpedo-boats and destroyers able to get out, and handled with even moderate skill and dash. They ought to keep the enemy's battleships at least 50 miles away during the night, and it is at night that the attempts to run in or out will be made. The blockading cruisers may perhaps venture to patrol at 30 miles' distance, and the destroyers and torpedo-boats will be nearer still. The mosquito fleet of the blockaded side will constantly skirmish with them, and use every effort to draw them away from the channels through which it has reason to believe blockade-runners are advancing. The chances are strongly in favour of any swift vessel in an attempt to run in or out. Whereas if the commander of the blockading fleet draws his cordon of ships sufficiently near the port to make ingress or egress really dangerous, he risks their destruction by mines and torpedoes, to say nothing of the danger of their coming during a chase under the guns of any land defences."

Lawrence, War and Neutrality in the Far East, 2d ed., pp. 57–59.

"There are two conflicting opinions" as to what in fact constitutes an effective blockade.

"According to one opinion, the definition of an effective blockade pronounced by the First Armed Neutrality of 1780 is valid, and a blockade is effective only when the approach to the coast is barred by a chain of men-of-war anchored on the spot and so near to one another that the line cannot be passed without obvious danger to the passing vessel. This corresponds to the practice hitherto followed by France.

"According to another opinion, a blockade is effective when the approach is watched—to use the words of Dr. Lushington—'by a force sufficient to render the egress and ingress dangerous, or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable.' According to this opinion there need be no chain of anchored men-of-war to expose any vessels attempting to break the blockade to a cross fire, but a real danger of capture suffices, whether the danger is caused by cruising or anchored men-of-war. This is the standpoint of theory and practice of Great Britain and the United States, and it seems likewise to be that of Germany and several German writers. The blockade during the American War of the whole coast of the Confederate States to the extent of 2500 nautical miles by four hundred

Federal cruisers could, of course, only be maintained by cruising vessels; and the fact that all neutral maritime States recognised it as effective shows that the opinion of dissenting writers has more theoretical than practical importance. * * *

"The question of effectiveness being one of fact, and the real danger to passing vessels being the characteristic of effectiveness of blockade, it must be recognised that in certain cases and in the absence of a sufficient number of men-of-war a blockade may be made effective through planting land batteries within range of any vessel attempting to pass, provided there be at least one man-of-war on the spot. But a stone blockade, so called because vessels laden with stones are sunk in the channel to block the approach, is not an effective blockade.

"And it must, lastly, be mentioned that the distance of the blockading men-of-war from the blockaded port or coast is immaterial so long as the circumstances and conditions of the special case justify such distance." * * *

"It is impossible to state exactly what degree of danger to a vessel attempting to pass is necessary to prove an effective blockade. It is recognised that a blockade does not cease to be effective in case now and then a vessel succeeds in passing the line unhindered, provided there was so much danger as to make her capture probable. Dr. Lushington strikingly dealt with the matter in the following words:—'The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a port. Nothing is further from my intention, nor indeed more opposed to my notions, than any relaxation of the rule that a blockade must be sufficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been, whether the force was competent and present, and, if so, the performance of the duty was presumed; and I think I may safely assert that in no case was a blockade held to be void when the blockading force was on the spot or near thereto on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron.'

"A blockade is effective so long as the danger lasts which makes probable the capture of such vessels as attempt to pass the approach. A blockade, therefore, ceases *ipso facto* by the absence of such danger, whether the blockading men-of-war are driven away, or are sent away for the fulfilment of some task which has nothing to do with the blockade, or voluntarily withdraw, or allow the passage of vessels in other cases than those which are exceptionally admissible. Thus, when in 1861, during the American Civil War, the Federal cruiser *Niagara*, which blockaded Charleston, was sent away and her place was taken after five days by the *Minnesota*, the blockade ceased to be effective, although the Federal Government refused to recognise this.

Oppenheim, vol. 2, pp. 462–465.

If the words "really to prevent access," in the Declaration of Paris "were taken literally, the successful crossing the line by one blockade-

runner would prove the blockade to be void, which has never been contended. The meaning therefore must be, 'to make the attempt at access highly dangerous.' But, this being so, a question remains as to the method by which the danger may be created. The continental powers, including Holland herself after her relative decline in naval power, have usually maintained that a blockade is only valid in law if the danger of ingress or egress arises from the cannon either of ships, stationary or sufficiently near one another, or of works on land. This is laid down, with more or less variety of expression, in the treaty of 1742 between France and Denmark, in that of 1753 between Holland and the Two Sicilies, in the declarations and treaties of armed neutrality in 1780, in the various adhesions of other continental states to that armed neutrality or its rules, and in the declarations and treaties of armed neutrality in 1800. When Russia, by a change of policy consequent on the battle of Copenhagen and the death of the emperor Paul, abandoned the armed neutrality of 1800, her treaty of 1801 with England required for a blockade the presence only of ships stationary *or*, instead of *and*, sufficiently near to create an evident danger of entering. Yet in 1823 she assured the United States that she no longer held herself bound by that engagement.

"On the other hand Great Britain ever since the institution of blockade as a technical procedure, and the United States ever since their independence, have acted on the view that the danger necessary to maintain the reality of a blockade may be at least in part created by cruisers, agreeing in that with the practice of Holland in the age when she founded the institution. They never asserted that the danger arising from liability to capture at any distance for intended or accomplished breach of a blockade, which at the hands of a power having the command of the sea may be very real, could without more vindicate its reality. There must be a distinct blockading squadron, which however need not be stationary. The Lords of Appeals, of whom Sir William Grant was the chief, expressed themselves in language which is thus reported in substance. 'It was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the [blockaded] island.'

"Those who accept the continental doctrine may support it, as is done by Hautefeuille and others, on the right acquired by a line of ships whose fires cross. That right cannot indeed be described as conquest, which is not now admitted except as arising by the terms of peace or by the extinction of the enemy state, nor even in those cases could conquest be asserted of any but littoral waters, outside which the blockading squadron may happen to lie. But whether within littoral waters or without them stationary ships with crossing fires may be held to have established an occupation, giving a right of control analogous to that exercised by a belligerent in the district occupied by him on land. Even so however the argument only reinforces the right of blockading by means of a stationary squadron. It does not put out of court the claim to a larger right of blockading based on international practice embodying and sanctioning a compromise between the opposing claims. And when we remember that the Anglo-American doctrine has been acted on for more than two centuries, and during

all that time, except for the short periods covered by the two armed neutralities, has been acquiesced in *de facto* even by those powers which have disputed it as a matter of law—also that the Declaration of Paris was so worded as not to exclude it—it seems to me that, in spite of the invidious name of 'paper blockade' which has been given to it, it cannot at this time of day be refused an authority equal to that of the other doctrine. It is a case in which neither a belligerent taking the line which suits him, nor a neutral resenting that line, can at present be stigmatised as a law-breaker, and for the solution of which some express international agreement is desirable.

"The question just discussed seems in the actual state of naval war to go to the root of blockade itself, for the danger to a stationary squadron from torpedoes and submarine boats would be so great at night that such a squadron could not keep its station except by day. On the other hand blockade by cruisers, if admitted, seems still to have a great part to play in the future. Captain Mahan has written: 'Is it necessary, to constitute a real danger to blockade-runners, that the blockading fleet should be in sight? Half a dozen fast steamers, cruising twenty miles off shore between the New Jersey and Long Island coasts, would be a very real danger to ships seeking to go in or out by the principal entrance to New York; and similar positions might effectually blockade Boston, the Delaware and the Chesapeake. * * * It seems probable in these days of submarines' [and we may now add wireless] 'telegraphs, that the blockading forces in shore and off shore, and from one port to another, might be in telegraphic communication with one another along the whole coast of the United States, readily giving mutual support; and if by some fortunate military combination one detachment were attacked in force, it could warn the others and retreat upon them. Granting that such a blockade off one port were broken on one day by fairly driving away the ships maintaining it, the notification of its being re-established would be cabled all over the world the next. To avoid such blockades there must be a military force afloat that will at all times so endanger a blockading fleet that it can by no means keep its place.' In these circumstances it seems likely that, so far as blockade may be employed in the future, the argument of necessity will induce even those powers whose theory has been that of blockade only by stationary ships to give it in practice the form of blockade by cruisers. The Danish government blockaded the ports of Northern Germany in 1864 by cruisers, though in its regulation of 15 February 1864, published expressly for that war, it had maintained its view of 1780 and 1800."

Westlake, vol. 2, pp. 264–267.

"Many" of the early treatries, "ending with that between Russia and Denmark in 1818, require the line of investment to be formed by a certain number of ships, usually two. That of 1753," between Holland and the Two Sicilies, "requires six ships, which may lie a little outside the range of the shore batteries, but which must expose blockade-runners to danger from their cannon."

Westlake, vol. 2, p. 264, Note 2.

"The current conception of effective blockade is that agreed upon between England and Russia in 1801: the port blockaded must be watched by ships anchored before it or stationed sufficiently near to

make egress or ingress obviously dangerous. All countries have adopted this idea. But this was before the days of torpedoes. The idea was, as actually expressed in certain Dutch treaties, that the blockading ships should be as close in as was compatible with safety from the enemy's coast defence. The defence in those days was guns. But what now of mobile defence? Is a blockading fleet entitled to be so far out as to be beyond torpedo-boat or destroyer range? If so it must be completely out of sight, and egress and ingress cannot be manifestly dangerous, and the blockading squadron must be cruising far from the port and far from territorial waters. If such distant and invisible blockade is not to be recognized as effective, then effective blockade is now impossible, and no means of controlling sea communications remains except general capture. It follows, then, that if the Continental Powers admit our right to control communication and deny us general capture, they must recognize such distant blockade as effective and lawful."

The Capture of Private Property at Sea, Julian S. Corbett; The Nineteenth Century and After, June, 1907, reprinted in Some Neglected Aspects of War, Mahan, pp. 136, 137.

"Whereas it is manifest that the blockade, which has been proclaimed by the enemy, of the whole Atlantic coast of the United States, nearly two thousand miles in extent, and abounding in ports, harbors, and navigable inlets, cannot be carried into effect by any adequate force actually stationed for the purpose; and it is rendered a matter of certainty and notoriety, by the multiplied and daily arrivals and departures of the public and private armed vessels of the United States, and of other vessels, that no such adequate force has been so stationed; And whereas a blockade thus destitute of the character of a regular and legal blockade, as defined and recognized by the established law of nations, whatever other purpose it may be made to answer, forms no lawful prohibition or obstacle to such neutral and friendly vessels as may choose to visit and trade with the United States; and whereas it accords with the interest and the amicable views of the United States, to favor and promote, as far as may be, the free and mutually beneficial commercial intercourse of all friendly nations disposed to engage therein, and with that view to afford to their vessels, destined to the United States, a more positive and satisfactory security against all interruptions, molestations, or vexations whatever from the cruisers of the United States:

"Now be it known that I, James Madison, President of the United States of America, do, by this my proclamation, strictly order and instruct all the public armed vessels of the United States, and all private armed vessels commissioned as privateers, or with letters of marque and reprisal, not to interrupt, detain, or otherwise molest or vex, any vessels whatever belonging to neutral powers, or the subjects or citizens thereof, which vessels shall be actually bound and proceeding to any port or place within the jurisdiction of the United States; but on the contrary to render to all such vessels all the aid and kind offices which they may need or require."

Proclamation of the President of June 29, 1814 (11 Stat. 762).

The proclamation of April 19, 1861 (12 U. S. Stat., 1258, 1259), announcing the purpose of the United States to blockade the

coast of certain of the southern states, recites that "for this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as prize, as may be deemed advisable."

In the proclamation of April 27, 1861, extending the blockade to certain other states it is announced that "an efficient blockade of the ports of those States will also be established."

The position of the United States in respect to a blockade not supported by an efficient force is set forth in a proclamation of the President of August 17, 1866 (14 Stat., 814), in reference to a decree of Maximilian of July 9, 1866, announcing a blockade of a certain portion of Mexico. This proclamation, after quoting the decree, reads:

"And whereas the decree thus recited, by declaring a belligerent blockade unsupported by competent military or naval forces, is in violation of the neutral rights of the United States, as defined by the law of nations, as well as of the treaties existing between the United States of America and the aforesaid United States of Mexico;

"Now, therefore, I, Andrew Johnson, President of the United States, do hereby proclaim and declare, that the aforesaid decree is held, and will be held, by the United States to be absolutely null and void, as against the government and citizens of the United States; and that any attempt which shall be made to enforce the same against the government or the citizens of the United States will be disallowed."

"3. Blockades in order to be binding must be effective."

Proclamation, April 26, 1898, of the President of the United States, issued at beginning of Spanish-American War.

"A lawful maritime blockade requires the actual presence of a sufficient force stationed at the entrance of the ports, sufficiently near to prevent communication. The only exception to this rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstances of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of a blockade. * * *"

Instructions, Dec. 24, 1846, from the United States Navy Department to the commanding officers of naval vessels in the Pacific, Vol. 55, British State Papers, p. 661.

"A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Instructions to Blockading Vessels. United States Navy Department General Order No. 492 of June 20, 1898.

In a memorandum dated March 23, 1898, prepared by the Secretary of the Navy (Mr. Long) for the information of the Commander in Chief of the U. S. North Atlantic Fleet, which "memorandum is based largely on certain suggestions made by Captain Mahan," the attitude of the United States in respect to what constitutes an effective blockade is set forth in the following language:—

"The Department will endeavor to furnish the commander in chief with a sufficient number of vessels to establish a strict blockade, particularly of the western half of the island [of Cuba], and of the ports of Havana and Matanzas in especial. Off much of the coast, and off the smaller harbors, a single vessel cruising to and fro may be all that is needed; this vessel of course keeping in touch with the rest of the fleet when possible. Off an important port, and notably off the port of Havana, in the event of torpedo vessels being within it, there should probably be three lines of blockade. The inner line should consist of small, fast vessels, either torpedo boats or revenue cutters, tugs, and the like, improvised to act as torpedo-boat destroyers and scouts, whose station shall be close to the mouth of the harbor. These vessels would of course stop blockade runners; but the prime object of their being would be to prevent the egress of torpedo boats. They should not only watch the latter, but should unhesitatingly attack them, no matter what the odds may be at the moment. Even if sunk they will have achieved a most useful end if they cripple a torpedo boat. They should fire upon and chase any hostile craft leaving port, and the vessels not engaged should steam to the firing.

"The second line will be placed 2 or 3 miles outside the inner one, and will consist, so far as is possible, of vessels like the *Cincinnati* or *Detroit*, which in case of need could promptly go to the first line of blockade. Outside of this second line will cruise the squadron of battle ships, which in the discretion of the commander in chief may lie at a considerable distance from the port, and may change position after nightfall. Of course no definite rule can be laid down as to the position of this squadron, for the commander in chief must be guided by circumstances as they arise; but it is worth calling his attention to the fact that the battle fleet must keep the sea, so as to make the blockade technically valid. The efficiency of the blockade does not depend upon the immediate presence of the fleet itself, but upon the fact that its support is always at hand, to support the inshore squadron and prevent the latter from being driven off by the enemy in port. A distance of 25 miles may be near enough, and if the position of the battle fleet can always be changed after nightfall, the chance of successful attack by the enemy's torpedo boats will be minimized. The Department would again repeat, however, that the captains in the inshore squadrons must understand that their duty is at any hazard to prevent hostile torpedo boats getting by them, to detect, and, more than that, to immediately grapple with and fight them under any circumstances. The torpedo boats, and even the torpedo-boat destroyers, lose nine-tenths of their menace when detected; and, moreover, they are fragile and easily destroyed."

Naval Operations of the War with Spain, pp. 164, 165.

"60. The blockade is effective when it is maintained by a force which is sufficient actually to prevent access to the hostile coast.

"The question whether a blockade according to the number and station of the blockading force with reference to the geographical situation before it, is actually effective, is subject in every single case to test by the prize court. It will be denied when, among other things, the sea traffic of a blockaded port with any other not blockaded port can be maintained. See 71."

German Prize Rules, 1909.

Article 3 of the Declaration of London, 1909, substantially appears as Art. 84 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"It is evident that even those states which acceded to this Declaration of Paris 1856 cannot interpret literally the last clause, 'sufficient really to prevent access to the coast of the enemy.' Probably no blockade could be maintained in this manner for any considerable length of time. During the night a fast vessel might pass in, or in a fog a vessel well acquainted with the locality might pass through, and in these days of submarines it might not be possible to guard against the passing of such a vessel. That it is not expected that the access to the coast will really be prevented is seen in the provisions for penalties for the breach of blockade. No penalties would be necessary under a literal interpretation of the declaration, for the access of vessels would be prevented, and if a vessel obtained access the blockade would not be effective, and hence the vessel would not be liable to penalty. This clause has been given a sane interpretation as meaning that the access of a vessel to the coast or her egress to the sea would be with evident danger. Such a blockade would be regarded as reasonably effective.

"To break such a blockade a neutral merchant vessel must resort to unusual means or efforts. If a vessel does this it would ordinarily imply the taking of an unusual risk for the hope of an unusual reward which would accrue in consequence of some special advantage gained by the blockaded belligerent. Penalty, therefore, would justly be inflicted by the other belligerent if possible in order to prevent aid to the blockaded belligerent.

"The law of nations requires, to constitute a blockade, that there should be the 'presence and position of a force rendering access to the prohibited place manifestly difficult and dangerous. Every jurist of reputation, who treats with precision on this branch of the laws of nations, refers to an actual and particular blockade.'

"Mr. Madison, Sec. of State, to Mr. Thornton, Oct. 27, 1803, 14 MS. Dom. Let. 215. See also letter of Mr. Madison to Mr. Merry, Dec. 24, 1803, id. 245."

Moore's Digest, vol. 7, p. 789.

In a letter, dated March 20, 1816, the American Secretary of State informed the Spanish Minister that "No maxim of the law of nations is better established than that a blockade shall be confined to particular ports, and that an adequate force shall be stationed at each to support it. The force should be stationary, and not a cruising squadron, and placed so near the entrance of the harbor or mouth of the river as to make it evidently dangerous for a vessel to enter. * * *"

Moore's Digest, vol. 7, p. 789.

Lord Lyons, in a despatch dated May 2, 1861, to Lord Russell, outlines a conversation he had with Mr. Seward, the American Secretary of State, in regard to the blockade of the Southern ports during the Civil War: "I observed to Mr. Seward that the limits of the blockade which it was intended to establish were not clearly stated. It was not easy to understand exactly to what extent of coast the expression 'the ports within' the States mentioned was applicable. Mr. Seward said that it was intended to blockade the whole coast from Chesapeake Bay to the mouth of the Rio Grande. I observed to him that the extent of the coast between the two points was, I supposed, about 3,000 miles. Surely the United States had not a naval force sufficient to establish an effective blockade of such a length of coast. Mr. Seward, however, maintained that the whole would be blockaded, and blockaded effectively."

British State Papers, vol. 55, p. 660.

In an instruction, dated February 15, 1862, from Earl Russell to Lord Lyons, British minister to the United States, the following reference is made to the effectiveness of the blockade of the ports of Charleston, S. C., and Wilmington, N. C.:

"It appears from the reports received from Her Majesty's naval officers that although a sufficient blockading force is stationed off those ports, various ships have successfully eluded the blockade; a question might therefore be raised as to whether such a blockade should be considered as effective.

"Her Majesty's Government, however, are of opinion that, assuming that the blockade is duly notified, and also that a number of ships is stationed and remains at the entrance of a port, sufficient really to prevent access to it or to create an evident danger of entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships may have successfully escaped through it (as in the particular instances here referred to), will not of itself prevent the blockade from being an effective one by international law.

"The adequacy of the force to maintain a blockade being always, and necessarily, a matter of fact and evidence, and one as to which different opinions may be entertained, a neutral State ought to exercise the greatest caution with reference to the disregard of a *de facto* and notified blockade; and ought not to disregard it, except when it entertains a conviction, which is shared by neutrals generally having an interest in the matter, that the power of blockade is abused by a State either unable to institute or maintain it, or unwilling, from some motive or other, to do so."

British State Papers, vol. 55, pp. 702, 703.

"October 15, 1888, the authorities at Port au Prince decided upon a blockade of the ports of Cape Haytian, Gonaives, and St. Marc. Next day they notified the American minister, and from that time on refused to clear vessels for those ports. It appeared that an attempt was made to establish a blockade at Cape Haytian, and that during the next twenty days a man-of-war was kept cruising between that port and Fort Liberte, about twenty-four miles to the eastward. During this time the cruiser never remained off Cape Haytian at night, and eight sailing vessels entered the port. From November 23 to December 3 no blockading vessel whatever appeared

off Cape Haytian, while from November 2 to December 1, inclusive, twenty-six sailing vessels and two steamships entered the port. On December 3 two Haytian men-of-war appeared and proceeded to fire upon the city, but, after remaining in the offing till December 6, they departed. From that time on hardly a semblance of a blockade existed, and as late as December 25 all the public armed vessels of Hayti were at Port au Prince. Soon after the declaration of blockade, an American schooner was seized off Gonaives, but as she had had no notice of its existence she was subsequently released and an indemnity paid. Other ports, in addition to those above mentioned, were also declared to be blockaded, but the circumstances as to enforcement were similar. It appeared, in fact, that for some time there were only two vessels available for blockade duty, and that both of these were on one or more occasions lying in the harbor of Port au Prince. The evidence appeared to be conclusive that the blockade had always been intermittent, and that it was at no time effective or valid in the sense of being maintained by a force sufficient to restrain access to the coast or to make it difficult to obtain ingress or egress or to preclude a reasonable chance of entrance. Under the circumstances, the Haytian Government was notified that no blockade was considered as existing, and that, if a blockade should be again proposed, 'due notice of the commencement thereof must be given, and a reasonable period during which neutral vessels will be permitted to depart with their cargoes must be allowed and will be reckoned from the date of such actual commencement.'

"Mr. Bayard, Sec. of State, to Mr. Thompson, min. to Hayti, No. 156, Feb. 27, 1889, For. Rel. 1889, 494."

Moore's Digest, vol. 7, pp. 792, 793.

"The French steamer *Olinde Rodriguez*, belonging to the Compagnie Générale Transatlantique, sailed from Havre June 16, 1898, on her regular voyage, under her mail contract with the French Government, for the West Indian ports of St. Thomas, San Juan (Porto Rico), Puerto Plata, Cape Haytien, St. Marc, Port au Prince, Gonaives, and return, calling at the same ports.

"A proclamation declaring San Juan to be blockaded was issued by the Government of the United States on June 27, 1898. The *Olinde Rodriguez* arrived at St. Thomas on July 3, and on July 4 entered the port of San Juan. The U. S. S. *Yosemite*, which was lying three miles southwestward of the port, on blockade duty, gave chase, but was unable to reach the steamer before she had turned in and come under the protection of the shore batteries. When on the following morning she came out, the commander of the *Yosemite*, accepting the master's statement that he did not know that the port was blockaded, endorsed on her log an official warning and permitted her to proceed. She duly completed her outward itinerary and had left Puerto Plata on her return voyage when, on July 17, she was captured by the United States steamship *New Orleans* off San Juan, on the charge of attempting to enter that port. Questions were raised (1) as to the existence of the intent to enter, and (2) as to the existence of a lawful blockade. The court below doubted the validity of the blockade, because it was maintained by only one cruiser. The Supreme Court observed that the test was whether

the blockade was 'practically effective;' that this, though a mixed question, was one 'more of fact than of law;' that, by General Orders, No. 492, 'a blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous;' that, while it was not practicable to define the degree of danger that should constitute a test, it was enough that the danger was 'real and apparent;' and that the question of effectiveness was not controlled by the number of the blockading force. The position could not, said the court, be maintained, that one modern cruiser, though sufficient in fact, was not sufficient in law; nor could a vessel, actually captured in attempting to enter a blockaded port, after a warning entered on her log by a cruiser off that port only a few days before, dispute the efficiency of the force to which she was subjected. The blockade was therefore held to be effective and binding. On the other hand, the court decided that the intent to break the blockade was not sufficiently established; but, in view of circumstances of suspicion, ordered that restitution should be awarded without damages, and that the costs and expenses of her custody and preservation, and all costs in the cause except the fees of counsel, should be imposed on the ship. The *Olinde Rodriguez*, 174 U. S. 510; cited in The *Newfoundland*, 176 U. S. 97."

Moore's Digest, vol. 7, pp. 795, 796.

"A neutral merchant vessel may, however, approach a port that has been blockaded and find that there are no belligerent vessels before the port. It may pass in."

International Law Situations, United States Naval War College, 1907, pp. 110–111.

In the case of the *Frederick Molke* (1798) (1 C. Rob. 86) the court said in respect to the legality of the blockade of Havre:—"These facts appear in the depositions of the master, 'that on his former voyage he cleared out from Lisbon to Copenhagen, but was really destined to Havre, if he could escape English cruisers; that he was warned by an English frigate, *The Diamond*, off Havre, not to go into Havre, as there were two or three ships that would stop him; but that he slipped in at night and delivered his cargo.' It is therefore sufficiently proved that there were ships on that station to prevent ingress, and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party."

In the case of the *Betsey* (1798) (1 C. Rob. 92 a, Scott, 798) Sir William Scott says in regard to the effectiveness of a blockade, that it is necessary "that the evidence of a blockade should be clear and decisive: but in this case there is only an affidavit of one of the captors, and the account which is there given is, 'that on the arrival of the British forces in the West Indies, a proclamation, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe to put themselves under the protection of the English; that on a refusal, hostile operations were commenced against them all;' but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in

succession. It is further stated, 'that in January, 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade.'

"The word complete is a word of great energy; and we might expect from it to find, that a number of vessels were stationed round the entrance of the port to cut off all communication; but, from the protest, I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, 'that on the 1st of January, after a general proclamation to the French islands, they were put into a state of *complete* blockade.' It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

"The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade: it is clear, indeed, that it could not in reason be sufficient to produce the effect, which the captors erroneously ascribed to it: but from the misapplication of these phrases in one instance, I learn, that we must not give too much weight to the use of them on this occasion; and, from the generality of these expressions, I think, we must infer, that there was not that actual blockade which the law is now distinctly understood to require.

"But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the municipality of Guadaloupe, which states 'the island to have been in a state of siege.' It is evident the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding, that the island was in a state of investment, from a foreign enemy, which we require to constitute blockade: I cannot, therefore, lay it down, that a blockade did exist, till the operations of the forces were actually directed against Guadaloupe in April.

"It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it: but this is expressly denied by the master. He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in: I shall therefore dismiss this part of the case. * * *"

A blockade was maintained during the Napoleonic wars of the River Ems and a long stretch of Prussian coast by one ship stationed in the Ems to stop vessels coming in or going out.

See the *Arthur* (1804) 1 Dod., 423.

In the case of the *Nancy* (1809) (1 Act. 57, Scott 817) it is said "that, to constitute a blockade, the intention to shut up the port should not only be generally made known to the vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be

able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels; and with such unparalleled rigor, that no vessel whatever had been able to enter the island during its continuance."

In the *Johanna Maria* (1855) (10 Moore P. C. 70, Scott 803) it was said that in the *Rolla* (6 C. Rob. 368), "Lord Stowell observed that the blockade had been very lax; that several vessels had been permitted by the blockading squadron to enter, and the observations relied on must be understood with regard to the circumstances out of which they arose. In this case, from the 5th of May, there had been an uninterrupted blockade; no single instance has been produced in which any vessel had been permitted by any of the blockading ships to enter the port; nor had any been permitted to come out after the 15th of May, with cargoes subsequently loaded. There is clear proof of a *de facto* blockade; full knowledge of it by the master, and nothing which could mislead him as to its extent or effect."

In discussing the question of the efficiency of a blockade in the case of the *Sarah Starr* (1861) (Blatch. P. C. 69, 87, on appeal 1 Blatch. P. C. 650, Fed. cases No. 12352 and No. 12353), the court said:—

"There can be no doubt that it is incumbent on the United States to establish the fact that an adequate force was assigned and stationed off these ports at the time of the egress from them of the above-named vessels, so as to render the ingress or departure of vessels to or from the ports dangerous. There need not be a closed cordon of vessels surrounding the places at all times, so as absolutely to command all approaches to the ports from without, or departure from them from within. The blockade must, however, be so sustained by competent forces as to render it efficient to all ordinary intent and apprehension. This, of course, admits of the accidental absence of blockading vessels from stress of weather or other contingencies, and will also dispense with the employment of the more active and rapid services of steam vessels in such accumulation of watchful forces as is sometimes exacted when ships moved by canvas only are used. What the law demands is the allotment and stationing of that amount of force for the service which shall render it physically hazardous for other craft to evade the blockade. To that end, the blockading forces must be such as to constitute an actual investment of the place blockaded. The English and American cases concur in all essentials as to the lawful constituents of a blockade in modern times, and the manner in which it shall be enforced. (1 Kent's Comm. 144 to 161; 3 Phillimore on International Law, 387, art. 294; The *Nornen*, 1 Spinks' Prize Cases, 171; The *Franciska*, Id., 111.) A cluster of suits were embraced within one decision in the last case. The doctrines of blockade were largely discussed by the court. It is stated, in a note, that the general decision was reversed on appeal; but it does not appear on what points. The case is, however, instructive as to the general application of the law of blockade.

"The testimony upon the preparatory interrogatories is very full and positive that no vessels-of-war were placed off those ports, within

view or knowledge of these vessels, when either of them came out; and it is made equivocal whether the blockade was actually set on foot fifteen days before the egress of either of them from the ports. It is made sufficiently certain, upon the proofs, that notice of the blockade had reached both vessels previous to their sailing from the ports. In this state of the case it is incumbent on the libellants to give evidence of the time the blockade was actually imposed, and that it was made efficient by forces stationed there adequate to prevent vessels from going in or leaving without the knowledge and interposition of the blockading force to prevent it. Although the evidence raises a suspicion that the *Aigburth* might be seeking an opportunity to enter a blockaded port, yet it is not sufficiently direct and impressive to justify her condemnation on that proof alone."

The *Circassian* (1864) (2 Wall. 135), quoting from the syllabus: "A blockade may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland fort, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter."

The *Baigorry* (1864) (2 Wall. 474), quoting from the syllabus: "The fact that the master and mate saw no blockading ships off the port where their vessel was loaded, and from which she sailed, is not enough to show that a blockade, once established and notified, had been discontinued."

In the case of Geipel *v.* Smith, (1872) (L. R. 2 Q. B. 404) a case construing a charter-party during the Franco-Prussian War and involving a voyage to the port of Hamburg that had been declared blockaded by the French, the court defined a blockade as "an act of a sovereign state or prince; and it is a restraint," within the meaning of a charter-party exempting restraints of princes, "provided the blockade is effective: and in the eye of the law a blockade is effective if the enemy's ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through."

In the case of the *Olinde Rodrigues* (1898) (174 U. S., 510, Scott. 835), the Supreme Court of the United States considered at length the question of the effectiveness of the blockade of the port of San Juan, Porto Rico, established by the United States naval forces during the Spanish-American War.

Mr. Chief Justice Fuller in delivering the opinion of the court said: "We are unable to concur with the learned district judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

"To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

"The fourth maxim of the Declaration of Paris (April 16, 1856) was: 'Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to

the coast of the enemy.' Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances. * * *

"In the *Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: 'It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense: and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it.'

"And in The *Frederick Molke*, 1 C. Rob. 86, the same great jurist said: 'For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party.'

"Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: 'A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous.'

"Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

"In The *Franciska*, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: 'What, then, is an efficient blockade, and how has it been defined, if, indeed, the term "definition" can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent (1 Kent's Com. 146), is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree,—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the law of nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone.' * * *

"In The *Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: 'When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to

such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed.' And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which 'necessarily led neutral vessels to believe these ports might be entered without incurring any risk.' The *Nancy*, 1 Acton, 57, 59.

"But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

"As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

"Even as long ago as 1809, in The *Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: 'Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and co-operate with the other vessels at the same time in the blockade of another neighboring port;' although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

"The ruling of Dr. Lushington in The *Franciska*, above cited, was to that effect, and the text-books refer to other instances.

"The learned district judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, 'since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded.' 2 Ortolan, 4th ed., 330, and note 2.

"Nor do we regard Sir William Scott's judgment in The *Arthur*, 1814, 1 Dodson, 423, 425, as of weight in favor of claimants. In

effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: 'This is a claim made by one of his Majesty's ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to his Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French Government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blackade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river.'

"Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

"We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

"What then were the facts as to the effectiveness of the blockade in the case before us?

"In the proclamation of June 27, 1898, occurs this paragraph: 'The United States of America has instituted and will maintain an effective blockade of all the ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico.' Proclamation No. 11, 30 Stat. 34. The blockade thus announced was not of the coast of Porto Rico, but of the port of San Juan, a town of less than 25.000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the *Yosemite*, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one-half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one-half miles. While the *Yosemite* was blockading the port she ran the armed transport *Antonio Lopez* aground six miles from San Juan; gave a number of neutral vessels official notice of blockade; warned off many from the port; and on the 5th of July, 1898, wrote into the log of the *Olinde Rodrigues*, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser *New Orleans*, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-pound-

ers; four 3-pounders in the tops; four 37-millimetre automatic guns, corresponding to 1-pounders. The range of her guns was five and one-half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving, at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search-lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

"Assuming that the *Olinde Rodrigues* attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risks; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective.

"But we are considering the blockade of the port of San Juan and not of the coast, and while additional vessels to cruise about the island might be desirable in order that the blockade should be positively effective, we think it a sufficient compliance with the obligations of international law if the blockade made egress or ingress dangerous in fact, and that the suggestions of a zealous American naval commander, in anticipation of a conflict of armed forces before San Juan, that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, cannot be allowed to have the effect of showing that the blockade which did exist was, as to this vessel, ineffective in point of law."

The *George* (1905) (2 Russ-Jap. P. C., 171) was a neutral steamer that entered Port Arthur on August 18, 1904, having eluded the Japanese blockading squadron. She had on board a non-contraband cargo of provisions and liquors. Cargo was transshipped at Port Arthur, and the following night the *George* attempted to leave port. but was captured and condemned as good prize for violation of blockade.

On appeal the Higher Prize Court sustained the decision of the lower court, saying: "At the time of the capture of this vessel more than 60 warships and torpedo boats were directly employed in blockade work, distributed over a line about 20 nautical miles long along the coasts round Port Arthur, at distances varying from 5 to 10 nautical miles from the shore. Moreover, the main squadron of seven warships in the neighborhood of Round Island, and four auxiliary cruisers and seven gunboats in the neighborhood of Lao-tieh-shan, were also engaged in patrolling and maintaining the blockade. It is clear that the blockade was effectively maintained, and that the '*George*' only succeeded in reaching Port Arthur by eluding the

vigilance of the blockading fleet. It cannot therefore be said that she ran no danger at that time. On her return she tried to elude the blockading fleet by coming out at night, but was captured."

In the case of the *King Arthur* (1905) (2 Russ-Jap. P. C., 217), the facts were as follows: On November 8, 1904, the *King Arthur*, a neutral merchantman, cleared Bombay for Newchwang with a large cargo of flour. At the time of clearing and for some time thereafter, Port Arthur was under blockade by the Japanese fleet. Arriving off the Liaotung Peninsula and while off the usual course of vessels bound for Newchwang, the *King Arthur* claimed to have been captured by a Russian naval vessel and taken into Port Arthur where her cargo was unladed. * * * After unlading, the *King Arthur* without any proceedings whatever on the part of a Russian Prize Court was allowed to leave Port Arthur in ballast. She was captured by a Japanese naval vessel off Chefoo and taken into Sasebo where she was condemned as good prize for violation of blockade.

In regard to the claimant's argument that as the *King Arthur* had "freely entered and left Port Arthur," the blockade was not effective, the Sasebo Prize Court said that "there is no doubt as to the fact that the blockade of the Liaotung Peninsula declared by the Commander-in-chief of the Japanese fleet on May 26th, 1904, was on the whole effective, and it is a settled rule of International Law that even if one or two vessels occasionally elude the vigilance of a blockading fleet and run the blockade, the effectiveness of the blockade is not thereby impaired."

On appeal the Higher Prize Court of Japan in sustaining the condemnation said:

"The blockade of the southern coasts of the Liaotung Peninsula declared by the Commander-in-Chief of the Japanese combined fleet on May 26th, 1904, was thereafter enforced by a sufficient force to attain its object. A large number of warships were usually distributed and engaged in the direct blockade of the coast for a distance of about 20 nautical miles in the neighborhood of Port Arthur, and on the day when this vessel entered Port Arthur three battleships, ten cruisers, and nine torpedo-boat destroyers, and, on December 19th, the date of the vessel's capture, nine destroyers, eight cruisers, and one battleship, were stationed at points about 10 nautical miles from the coast, and also patrolled elsewhere in the course of their blockading duties. It is, therefore, clear that the blockade was effectively maintained. That this vessel succeeded in arriving off Port Arthur was merely due to the fact that she eluded the vigilance of the blockading fleet and succeeded in passing the blockaded line, and it cannot be said that she ran no danger at the time. Accordingly the appellant's contention that the blockade of the southern coasts of the Liaotung Peninsula was ineffective is contrary to the facts, and the fifth point of the appeal is groundless."

BLOCKADE NOT RAISED BY TEMPORARY WITHDRAWAL OF BLOCKADERS, DUE TO SEVERE WEATHER.

A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.—*Article 4, Declaration of London, 1909.*

"It is not enough for a blockade to be established; it must be maintained. If it is raised it may be reestablished, but this requires the observance of the same formalities as though it were established for the first time. By tradition, a blockade is not regarded as raised when it is in consequence of stress of weather that the blockading forces are temporarily withdrawn. This is laid down in article 4. It must be considered limitative in the sense that stress of weather is the only form of compulsion which can be alleged. If the blockading forces were withdrawn for any other reason, the blockade would be regarded as raised, and, if it were resumed, articles 12 (last rule) and 13 would apply.

General report of drafting committee to London Naval Conference.

The Institute of International Law at the meeting in Turin in 1882 recognized the fact that where blockading vessels are driven away by bad weather the blockade does not lose its legality.

See art. 38 of the Resolutions, p. 52.

"The occasional absence of the blockading squadron, produced by accident as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension, and the reason of it, be known; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud. The American government seemed disposed to admit the continuance of the blockade in such a case; and the language of the judicial authorities in New York has been in favor of the solidity and justness of the English doctrine of blockade on this point."

Kent, Vol. I, p. 151.

"The only exception to the general rule which requires the *actual presence* of an *adequate* force to constitute a legal blockade, is the temporary absence of the blockading squadron produced by accident, as in the case of a storm. Such accidental removal of blockading force, if it be only for a very short time, does not suspend the legal operation of the blockade, and an attempt to take advantage of such an accidental removal, is regarded as a fraudulent attempt to break the blockade. But if the blockading forces should be so scattered or injured by the storm, as to be unable to resume their stations without repairs, and within a reasonable time, the blockade will be considered as terminated, in the same manner as if the blockading

squadron had been driven away by a superior force of the enemy. Some ports are subject to such periodical storms during one or more months of each year, that any blockading squadron is obliged to leave its station, and seek refuge in some other harbor till the seasons of storms is passed. In such cases the legal operation of the blockade is suspended. It should be remembered, however, that some text-writers do not admit this exception of the temporary and accidental absence of the blockading force. They say that the blockade is not mere theory, but the material result of a material fact, (*resultat materiel d'un fait materiel*,) and, consequently, can not exist in the absence of that fact. That, therefore, the blockade must be regarded as raised the moment the blockading force is removed, no matter whether the absence is for a long or short period, or whether produced by accident, by storm, or by an opposing force."

Halleck, 539, 540.

"The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade."

Wheaton, p. 675.

"The British and American writers and diplomatists take a practical view of the subject, and do not lay down an absolute rule that if, by stress of weather, there shall intervene an hour or day when the blockade was not effective, a new inception and notice is required. If the force and its disposition was adequate, and the interruption temporary by stress of weather, and with no change of intention, and restored in a reasonable time, the neutral has his chance of getting in or out; but a new inception, *ab origine*, is not required. Lord Russell, in his reply of Feb. 10, 1863, to Mr. Mason, the agent of the rebel States, says, 'There is no doubt that a blockade would be in legal existence, although a sudden storm or change of wind blew off the squadron. Such an accident does not suspend, much less break, a blockade; whereas, on the contrary, the driving off a blockading force by a superior force does break a blackade, which must be renewed *de novo*, in the usual form, to be binding upon neutrals.'"

Wheaton, Dana's Note 233, p. 675.

"Fauchille, while pushing his vindication of neutral rights to their extreme limit, holds that the United States accept the position of Sir W. Scott that a blockade is not broken by an accidental dispersion of the blockading squadron through stress of weather. 'In 1800, the United States held that a blockade was maintained notwithstanding a temporary dispersion of the blockaders by storm (Mr. Marshall to Mr. King, September 20, 1800), and the same view was enforced by Mr. Mason in his instructions to the naval commanders of December 24, 1846.' He admits, also, that the same position is taken by Phillimore, III, Sec. 294; 1 Kent, 365; and other high authorities. But he proceeds to cite the opinion of Ortolan (II.

311, and also Deane on Blockade, 51) to the effect that while a blockade is not vacated permanently by such a dispersion, it is suspended while the dispersion continues, so that vessels entering during such an interval are not liable to be seized for blockade running. He proceeds to argue that the preponderance of reason and of authority is with the position that when a blockading force is dispersed by stress of weather or by other causes, the blockade is broken, and can not be renewed except by notice, as if it were a new blockade.

"Fauchille, Blocus Maritime, 155."

Moore's Digest, vol. 7, pp. 843, 844.

A blockade is not raised by reason of the temporary absence of the blockading vessel made necessary on account of stress of weather.

Hall, p. 727.

"The occasional ingress or egress of vessels when the weather gives them special advantages, or if for any other reason they are able to pass through the lines of closure, does not render the blockade ineffective."

Lawrence, p. 684.

"Practice and the majority of writers have always recognised the fact that a blockade does not cease to be effective in case the blockading force is driven away for a short time through stress of weather."

Oppenheim, vol. 2, p. 465.

There is some doubt "whether the exception of interruption by weather can be admitted. It is affirmed by Lord Stowell," in the case of The *Hoffnung*, 6 C. Rob. 112, "and admitted by Ortolan and by Pillet, the latter of whom adds that Stowell's decision on the point 'has been received without difficulty,' but it is not admitted by Gessner. The only difference to a neutral between interruption of a blockade by weather and by any other cause is that, in the former case, he has before his senses a reason for rejecting the supposition that the interruption arises from an intention to discontinue: but what is the importance of the belligerent's intention, if the rule is that the blockade must be real? And Gessner urges that the consequences of chance and the fortune of war must be borne by the party on whom the blow falls. The exception appears to me to be maintainable on the ground that blockade would be almost an absurdity if weather were not understood to be allowed for, but I deprecate maintaining it on the ground of intention, which would favour serious tampering with the necessary reality of blockades."

Westlake, vol. 2, pp. 272–273.

The temporary absence of the blockading squadron due to a storm "does not suspend the legal operation of a blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade. * * *"

Instructions, Dec. 24, 1846, from the United States Navy Department to the Commanding Officers of naval vessels in the Pacific. Vol. 55, British State Papers, p. 661.

Assuming that the blockading belligerent "vessels have been scattered by a storm and that the neutral vessel passes out of the port

just as the blockading vessels return to their stations, would it be held that the neutral vessel had violated an effective blockade? The general consensus is that the temporary scattering of vessels before a blockaded port by a storm does not break the blockade. The interpretation of the word 'temporary' is still open to question. What should be considered a 'temporary suspension?' Blumerincq proposes twenty-four hours' absence as the limit of 'temporary suspension.' Others attempt to fix a limit of distance, the character of the storm, etc., as factors in determining suspension. It is difficult to reconcile the doctrine of 'temporary suspension' with the principles of the Declaration of Paris.

"The United States recognizes the necessity of observing the rules of International law in maintaining a blockade, and General Order No. 492 of the Navy Department, June 20, 1898, gives quite full statement for the guidance of blockading vessels and cruisers:

'If the blockading vessels be driven away by stress of the weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for the purposes of the blockade, such as chasing a blockade runner, or even are driven away by the enemy's force, the blockade is abandoned or broken.'

"From these instructions it may be seen that dispersion from stress of weather is not held to interrupt the continuity of the blockade, though no definite time of absence or other limiting specification is indicated. Voluntary departure, except for chase of a blockade runner, is held to break the blockade, as is flight before an enemy."

International Law Situations, United States Naval War College, 1907, pp. 111–113.

ART. 112 of Holland's Naval Prize Law provides that the validity of a blockade is not affected in case the blockading force is "caused by stress of weather" to abandon "merely" temporarily its position.

Holland cites on this point The *Columbia*, 1 C. Rob., 154, and The *Nancy*, 1 Acton, 57.

"ART. 37. * * * If the blockading force be driven away by stress of weather, and return without delay to its station, the continuity of the blockade is not thereby broken. * * *"

United States Naval Code, 1900.

"ART. 21. * * * Should a fleet, or warship, on account of bad weather, or in order to carry out the purposes of the blockade, leave the blockaded area temporarily, the blockade shall not thereby cease to be valid."

Japanese Regulations, 1904.

"ART. 30. A vessel shall be exempt from capture:—

"When, on account of bad weather * * * the necessity arises for a ship to put into port, and there being no other port or bay at which she can call, she enters the blockaded area."

Japanese Regulations, 1904.

"71. * * * A blockade is not raised when the blockading force is temporarily withdrawn on account of heavy weather."

German Prize Rules, 1909.

"72. A blockade is not considered as raised if by reason of bad weather the blockading forces are temporarily at a distance."

French Naval Regulations, 1912.

Article 4 of the Declaration of London, 1909, substantially appears as Art. 85 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the case of the *Frederick Molke* (1798) (1 C. Rob. 86), it was said by Sir William Scott that "the circumstance of being blown off by wind" was not "sufficient in law to remove a blockade."

In the case of The *Columbia* (1799) (1 C. Rob. 154), the court said that a "blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade; but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud."

Radcliff *v.* United Insurance Company (1810) (7 Johns., 384), was an action on an insurance policy on a vessel, excepting risk of blockaded port. The vessel was captured and condemned for breach of blockade.

Chancellor Kent in delivering the opinion of the court said:— "The plaintiffs rely most on the fact of the dispersion of the fleet, on account of a storm. Such accidental removal does not break blockades, so long as the fleet uses due diligence to resume their station. If a neutral arrives at a port when the blockading squadron is away, and is ignorant of the cause of the removal, then he is not liable for breach of blockade, but where he is fairly chargeable with the notice of the cause of the absence and knows it is an accidental dispersion on account of storm, to attempt to enter would be a fraud on belligerents and a breach of the blockade."

In The *Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions."

Quoted by the Supreme Court in the case of the *Olinde Rodrigues* (1898) (174 U. S., 510, Scott, 835).

A blockade must be applied impartially to the ships of all nations.—*Article 5, Declaration of London, 1909.*

"Blockade, as an operation of lawful warfare, must be respected by neutrals in so far as it really remains an operation of war which has the object of interrupting all commercial relations with the blockaded port. It may not be made the means of allowing a belligerent to favor the vessels of certain nations by letting them pass. This is the point of article 5."

General report of drafting committee to London Naval Conference.

A blockade is "dissolved by repeated instances of an improper relaxation of the application of the blockading force to the purposes intended. The mere presence of an adequate force is not sufficient to constitute and maintain a blockade, but its application must be constant and uniform, to prevent all communication with the port it incloses. If, through motives of civility, or other considerations, it should allow ships, not privileged by law, to enter or depart, the irregularity may be justly held to vitiate the blockade, as it necessarily tends to deceive other parties. Where some are suffered to pass, others will have a right to infer that the blockade is raised. To justify this presumption, however, there must be repeated instances of an improper relaxation, for one or two cases would hardly be deemed sufficient to warrant the belief that the legal restraint on neutral commerce had been wholly removed.

* * * * * * *

"There are but few cases where the entrance of a vessel into a blockaded port, or an attempt to enter, is ever justified or excused. A license from the government of the blockading state to enter the blockaded port is always a sufficient justification, and * * * all such licenses are to be liberally construed. But a general license to enter the port before the blockade would not be available after it had commenced; to constitute a sufficient protection it must authorize the vessel to enter the port as one blockaded."

Halleck, pp. 545, 559.

The case of the *Franciska* (Moore's P. C. Vol. 10, p. 37; Scott, p. 804) held "that it was not competent for a belligerent to blockade a port as against neutrals, while he allowed his own or his enemy's merchant vessels privileges of ingress and egress, for the purpose of trade, which were not allowed to the neutrals. The objections to such a course are not only that it is not equal, but that, if the courts should attempt to make it equal by extending the same privileges to neutrals in the same situation, there would arise a confusion and perplexity as to the nature of the blockade and the limits of the privileges, to which no neutrals ought to be subjected. The inclination of the Privy Council was to consider that no blockade was valid against neutrals, however its terms might be notified, unless it under-

took to make a complete exclusion of trade and communication of all kinds, through the blockade, by ingress or egress; but it would not render a blockade invalid, to allow fixed periods of time, according to modern usage, for vessels in port, or destined to the port before the establishment of the blockade, to enter or come out, or to allow the passage of neutral vessels of war, or despatch-vessels, under neutral sovereign responsibility."

Wheaton, Dana's Note 233, p. 675.

Dana says it was held in the case of the *Franciska* (Moore's P. C., 59) that "if a blockade de facto exists, but the government have allowed privileges, to their own or the enemy's merchant vessels, of ingress or egress, for the benefit of its own trade, then, even if such blockade be valid against neutrals, or if they could be allowed the same privileges granted to the merchant-vessels of the belligerents, a notice of blockade would not be effectual, unless it explained clearly the privileges. And, in the case before the court, it was held that notoriety, at the vessel's port of departure, of a blockade subject to certain privileges of trade not specifically known, would not affect the neutral with knowledge."

Wheaton, Dana's Note 235, p. 682.

"The blockading commander must apply his blockade impartially to the ships of all nations including his own. If he shows favor to those of any particular state, neutrals may remonstrate, and in the last resort decline to regard the blockade as valid."

Lawrence, p. 688.

Exceptions Under Special License.

"A blockade is really in being when vessels of all nations are interdicted and prevented from ingress or egress. Blockade as a means of warfare is admissible only in the form of a *universal* blockade. * * * If the blockading belligerent were to allow the ingress or egress of vessels of one nation, no blockade would exist."

"On the other hand, provided a blockade is universal, a special licence of ingress or egress may be given to a special vessel and for a particular purpose. * * * This exception to the general rule is not mentioned by the Declaration of London, but I have no doubt that the International Prize Court would recognise it. * * * When during the Crimean War Great Britain allowed Russian vessels to export goods from blockaded ports, and accordingly the egress of such vessels from the blockaded port of Riga was permitted, the blockade of Riga ceased to be effective, because it tried to interfere with neutral commerce only; therefore, the capture of the Danish vessel *Franciska* [Spinks, 287] for attempting to break the blockade was not upheld."

Oppenheim, vol. 2, pp. 452, 453, and 465.

"Licenses to particular persons, in cases of blockade and others, were granted by Great Britain during the wars of the French revolution and empire, in favour as well of belligerent as of neutral individuals, and caused great offense. Such licenses in case of blockade appear to be indefensible."

Westlake, vol. 2, pp. 273, 274.

ART. 112 of Holland's Naval Prize Law provides that a blockade will "cease to exist if the blockading force— * * *

"4. Be partial in the execution of its duties towards one ship rather than another, or toward the ships of one nation rather than those of another.[1]

"113. Should, however, the Commander seize several vessels at once, and find himself unable to detain them all, it will not be an improper act of partiality, nor is it a relaxation of the Blockade, if he releases some and detains the rest." [2]

"59. To be legally binding, the blockade must be * * * impartially administered. * * *"

"61. The blockade is impartially administered when it is maintained equally against the merchant shipping of all flags."

German Prize Rules, 1909.

Article 5 of Declaration of London, 1909, substantially appears as Art. 86 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"By the law of nations 'a belligerent may not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of this principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy.'

"Twiss, Law of Nations, Rights and Duties in Time of War, Sec. 120 p. 229, quoting the language of Dr. Lushington, in the case of the *Franciska*, 2 Spinks, 135.

"This case referred to the British order in council of March 29, 1854, under which Russian merchant vessels in the British dominions were allowed six weeks for loading their cargoes and departing and were then exempted from capture while on the voyage to their destination. It was held that during the interval provided by this order no valid blockade of the Russian ports in the Baltic could be established by the British fleet. 'It is obvious,' says Twiss, 'that so long as enemy vessels are allowed by a belligerent power freely to enter or to come out of enemy ports, the condition of things, which alone authorizes a belligerent to interfere at all with the trade of neutrals does not exist, namely, the necessity of interdicting all communication by way of trade with the ports in question, in order to compel the enemy to submission.' The decision of Dr. Lushington was confirmed by the Lords of Appeal, but, in rendering their decision, their lordships suggested that enemy ships found at the outbreak of war in ports which they had entered in time of peace, with the expectation that it would continue, might be considered as forming an exceptional class, so that an express permission to enter their port of destination, though it was blockaded, might perhaps not affect the validity of the blockade. They might, said their lordships, be re-

[1] "*Rolla*, 6 C. Rob. 364. *Fox*, Edwards, 311. *Success*, 1 Dod. 131. *Francisca*, Spinks, 287."

[2] "*Rolla*, 6 C. Rob. 364."

garded as falling within the rule with regard to licenses granted in particular cases on special grounds. (10 Moore P. C. 56.)"

Moore's Digest, vol. 7, pp. 845, 846.

"Early in the war [between the United States and Spain] special permission was given to certain neutral vessels to enter specified blockaded ports in Cuba in order to bring away Americans and any neutrals who might desire to leave. The United States consul at Kingston, Jamaica, was instructed to give certificates for the purpose of passing the blockade to the designated vessels.

"Mr. Moore, Act. Sec. of State, to Messrs. E. A. Atkins & Co., tels. May 3 and May 5, 1898, 228 MS. Dom. Let. 227, 269.

"See, also, Mr. Moore, Asst. Sec. of State, to Mr. Manso, May 9, 1898, 228 MS. Dom. Let. 355."

Moore's Digest, vol. 7, p. 847.

Exceptions, for Landing Passengers and Mails.

"On several occasions during the war between the United States and Spain vessels were, for special reasons and for special purposes, allowed by the United States to enter places which the American forces had blockaded. After the blockade of certain ports on the north coast of Cuba, the French mail steamer *Lafayette* was permitted to enter the port of Havana for the purpose of landing mails and passengers. This concession was granted on the request of the French embassy, coupled with the representation that the vessel sailed from St. Nazaire, in France, for Havana before the proclamation was issued. A similar privilege was extended to the German steamer *Polaria* on the request of the German embassy, with the qualification that she should first obtain a formal permit from the United States naval commandant at Key West, that her entrance into Havana was for the sole purpose of landing her Hamburg passengers and mails, and that she should not land cargo of any kind, nor, with the exception of certain articles intended for the Emperor, take away any, though permission was granted to bring away 'any American or neutral passengers that may desire to depart in her, but no others.'

"Mr. Day, Sec. of State, to M. Cambon, French ambass., May 7, 1898, MS. Notes to French Leg. X. 492; Mr. Day. Sec. of State to Mr. von Holleben, German ambass., May 10 and May 13, 1898, MS. Notes to German Leg. XII. 132, 134; Mr. Moore, Asst. Sec. of State, to Sec. of Navy May 13, 1898, 228 MS. Dom. Let. 460.

"In harmony with the conditions imposed in these cases, permission was refused to neutrals to pass the blockade merely for the purpose of taking on board and bringing away neutral property. (Mr. Day, Sec. of State, to Sir J. Pauncefote, Brit. ambass., No. 1016, May 16, 1898, MS. Notes to Brit. Leg. XXIV. 191; Mr. Day, Sec. of State, to Mr. von Holleben, Aug. 8, 1898, MS. Notes to German Leg. XII. 177.)"

Moore's Digest, vol. 7, p. 847.

In the case of the Rolla (1807) (6 C. Rob., 365) it was asserted that a blockade of Montevideo was void for the alleged reason that it was not impartially maintained in that some ships were allowed to come in and go out which privileges were not accorded to other ships. On this point Sir William Scott said:—"I confess, if I was satisfied

of the fact that such instances did occur, I should be disposed to admit the conclusion that such a mode of keeping up, or rather of relaxing the blockade, would altogether destroy the effect of it. For what is a blockade but a uniform universal exclusion of all vessels not privileged by law? If some are permitted to pass, others will have a right to infer that the blockade is raised. If it were shown, therefore, that ships not privileged by law have been allowed to enter or come out, from motives of civility, or other considerations, I should be disposed to admit that other parties would be justified in presuming that the blockade had been taken off."

The *Success* (1812) (1 Dod. 131, 2 Roscoe, 140) was captured for breach of Order in Council of January 7, 1807, declaring all ports from which British ships are excluded to be in a state of blockade. Sir William Scott said:—"The blockade which has thus been imposed is certainly of a new and extended kind; but has arisen necessarily out of the extraordinary decrees issued by the rules of France against the commerce of this country, and subsists, therefore, in the apprehension of the Court at least, in perfect justice. What then is the situation in which British subjects are placed by these retaliatory measures which have been resorted to as a defense against the injustice and violence of the enemy? Is it competent to them to trade at the ports thus placed under blockade, provided they can by any means elude the vigilance of the government of that country in which the ports happen to be situated? I am of opinion that they cannot. The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded. It would be a shameful abuse of belligerent right thus to convert the blockade into a mere instrument of commercial monopoly; and for this reason British subjects have not been permitted, except under special license, to have access to those ports which lie under an interdiction as to general trade. * * * In no case has an intercourse with blockaded ports been allowed, except a license has been first specially granted for that purpose. It has been described as a strange and absurd proceeding to deprive British subjects of the power to trade with these interdicted ports, when the very effect intended to be produced by the Order in Council was to compel the admission of British merchandise. The object of the government in imposing the blockade has been truly represented; but that object must be attained through the general privations occasioned to the enemy, not by the encouragement of the trade of your own subjects to the exclusion of neutral trade; a contrary mode of proceeding might perhaps be attended with advantage, but it would not be a legitimate advantage, since it is inconsistent with the rights of other countries."

The *Franciska* (1855) (10 Moore P. C. 37, Scott, 804). On April 5, 1854, the English Baltic fleet blockaded, *de facto*, the coast of Courland. The notice of the blockade, however, that was sent out to the British Ministers, including the British Minister at Copenhagen, tended to create the impression that all ports of Russia on the Baltic were under blockade. On the day of this blockade, the

British Government issued orders giving permission up to May 15 for Russian vessels to discharge cargoes from Russian ports in the Baltic and White sea to their port of destination, even though such ports were under blockade. Similar permission was granted by the French, while Russia gave a like indulgence to British and French vessels. On May 14 the *Franciska*, a neutral Danish vessel sailed from Copenhagen for Riga, and was captured off Riga by a British vessel on May 22 for violation of blockade, and later condemned as good prize. Appeal was taken to the Privy Council.

Among the grounds of appeal was the allegation that the blockade was not applied impartially, in that Russian vessels were exempted from seizure for a certain period. On this particular point it was said by the Court:

"As regards export, therefore, from the Baltic ports, by the effect of these several ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general law of nations, be liable to confiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

"In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the law of nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection.

"That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review: 'The argument stands thus: by the law of nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely concede; and I should regret to think if any authority could be cited from the decisions of any British court administering the law of nations, which could be with truth asserted to maintain a contrary doctrine.'

"The learned judge, after discussing the question how far licenses to enter blockaded ports would invalidate a blockade and pointing out the important distinctions between blockades according to the ordinary law of nations, and the blockades introduced during the last war by the Berlin and Milan decrees on the one hand, and the British Orders in Council on the other, and between special licenses granted for a particular occasion and licenses granted indiscriminately, proceeds, 'I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it

be partial and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit.' And he concludes his able discussion of this part of the case, in these words: 'With respect to the present question I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral states ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance.' The learned judge holds that such relaxation does not affect the general validity of the blockade.

"In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent, either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded. * * *

"It is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In The *Frederick Molke*, 1 Rob. 87, he says: 'What is the object of a blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place. In The *Betsey*, 1 Rob. 93, 'After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy.' In the *Vrouw Judith*, 1 Rob. 150, 'A blockade is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation.' In The *Rolla*, 6 Rob. 372, 'What is a blockade but a uniform universal exclusion of all vessels not privileged by law?' In The *Success*, 1 Dods. 134, 'The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded.'

"It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favor, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their lordships have great difficulty in assenting to this proposition. In the first place, the particular

relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the court it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

"The counsel on both sides at their lordships' bar understood that the learned judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

"Again it is not easy to answer the objections a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is at liberty to select particular points in which it suits his purpose that the blockade should be violated with immunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

"But the ambiguity in which all these questions are left by the Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their lordships, another strong argument against the legality of the blockade in this case. If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral states, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty, whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

"If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port: for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence."

The Commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.—*Article 6, Declaration of London, 1909.*

"Does the prohibition which applies to all merchant vessels apply also to warships? No definite reply can be given. The commander of the blockading forces may think it useful to cut off all communication with the blockaded place and refuse access to neutral warships; no rule is imposed on him. If he lets them in, it is as a matter of courtesy. If a rule has been drawn up merely to lay down this, it is in order that it may not be claimed that a blockade has ceased to be effective on account of leave granted to such and such neutral warships.

The blockading commander must act impartially, as stated in article 5. Nevertheless, the mere fact that he has let a warship pass does not oblige him to let pass all neutral warships which may come. It is a question of judgment. The presence of a neutral warship in a blockaded port may not have the same consequences at all stages of the blockade, and the commander must be left free to judge whether he can be courteous without making any sacrifice of his military interests."

General report of drafting committee to London Naval Conference.

"Neutral vessels of war have no privilege against blockade; and the fact that they can not be searched gives the blockading power the more right to require them to keep clear of the lines of blockade. * * * During the Mexican blockade by France, special orders were given, prohibiting the entrance of neutral ships of war; but it was allowed by special orders in the civil war in the United States. * * * And the United States permitted neutral vessels of war to carry through the blockade the official despatches not only of their own governments, but of other friendly governments."

Wheaton, Dana's Note, 233, p. 675.

"The right possessed by a belligerent of excluding neutral ships of war from a blockaded place is usually waived in practice as a matter of international courtesy; and for a like reason the minister of a neutral state resident in the country of the blockaded ports is permitted to despatch from it a vessel exclusively employed in carrying home distressed seamen of his own nation."

Hall, p. 737.

"Men-of-war of all neutral nations may be allowed to pass to and fro unhindered. Thus, when during the American Civil War the Federal Government blockaded the coast of the Confederate States, neutral men-of-war were not prevented from ingress and egress.

But it must be specially observed that a belligerent has a right to prevent neutral men-of-war from passing through the line of blockade, and it is entirely within his discretion whether or not he will admit or exclude them; nor is he compelled to admit them all, even though he has admitted one or more of them."

Oppenheim, vol. 2, p. 453.

"ART. 38. Neutral vessels of war must obtain permission to pass the blockade, either from the government of the State whose forces are blockading the port or from the officer in general or local charge of the blockade. If necessary, these vessels should establish their identity to the satisfaction of the commander of the local blockading force. If military operations or other reasons should so require, permission to enter a blockaded port can be restricted or denied."

United States Naval Code, 1900.

"62. The naval commander of the blockading force may permit neutral ships of war to visit a blockaded port and later to leave it. Permission granted to one ship of war, however, does not furnish any ground for another ship of war to claim a like permission."

German Prize Rules, 1909.

"82. You may grant to warships permission to enter a blockaded port and to leave later."

French Naval Regulations, 1912.

Article 6, Declaration of London, 1909, substantially appears as Art. 87 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"The men-of-war of neutral powers should, as a matter of courtesy, be allowed free passage to and from a blockaded port."

Instructions to Blockading Vessels, United States Navy Department General Order No. 492 of June 20, 1898.

"Commodore Biddle, in a letter of November 11, 1827,[1] to the Brazilian admiral, states 'that blockades never have been deemed to extend to public ships. Great Britain, almost perpetually at war, and numerically superior at sea to any other nation, never for a moment pretended that neutral ships-of-war could be affected by blockades. During several years of the war in Europe, the Government of the United States maintained its diplomatic intercourse with France, exclusively by means of its public ships entering the French blockaded ports. In 1811, in the United States steamer *Hornet*, I myself went into Cherbourg, then blockaded by a British squadron; was boarded as I went in by the blockading squadron, but merely for the purpose of ascertaining our national character.' The Brazilian admiral in reply stated that by a recent decision of the British cabinet, 'vessels-of-war could not enter blockaded ports, and such has continued to be the practice of the English.'"

Moore's Digest, vol. 7, p. 852.

In a letter dated May 2, 1861, to the Prussian minister, Mr. Seward, referring to the blockade of the Southern ports, said that "armed

[1] Vol. 15, British State Papers, p. 1120.

vessels of neutral states will have the right to enter and depart from the interdicted ports."

Moore's Digest, vol. 7, p. 852.

"Referring, on October 4, 1861, to reports that foreign vessels of war, which had entered blockaded Confederate ports, had 'in some instances carried passengers, and in others private correspondence,' Mr. Seward, in order to prevent future misunderstanding, notified the members of the diplomatic corps that no foreign vessel of war which might enter or depart from a blockaded port should 'carry any person as a passenger, or any correspondence other than that between the government of the country to which the vessel may belong and the diplomatic and consular agents of such country at the ports adverted to.' Mr. Seward, Sec. of State, to Lord Lyons, British min. (circular), Oct. 4, 1861, Dip. Cor. 1861, 152."

Moore's Digest, vol. 7, p. 852.

"In 1868, Admiral Davis, commanding the South Atlantic Squadron, sent the U. S. S. *Wasp* up the Parana, with a view to bring away the American minister, Mr. Washburn, and his family from Paraguay. The commander of the allied forces of Brazil and the Argentine Republic refused to permit the *Wasp* to pass through his blockade up to Asuncion, in consequence of which the *Wasp* returned to Montevideo without having accomplished the object of her voyage. Mr. Seward took the ground that the United States had 'a lawful right to send a ship of war up the Parana to Asuncion, for the purpose of receiving the United States minister and his family, and conveying them from the scene of siege and war to neutral territory or waters,' and that the refusal of the commander of the allied forces to permit the *Wasp* to pass through 'violates becoming comity on the part of Brazil and the allies towards the United States, and is in contravention of the law of nations.' Before this instruction was received at Rio de Janeiro, the difference was settled by the action of the allies in agreeing that a United States man-of-war might proceed to Asuncion for Mr. Washburn and his family, subject to such trifling delay as might arise from the active execution of military operations."

Moore's Digest, vol. 7, p. 854.

"'I am aware of no instance in which the right of blockade has been invoked for the purpose of preventing the Government of a neutral and friendly state from communicating with its diplomatic agent accredited to the government of the blockaded territory. It is believed that safe conducts are rarely, if ever, refused under such circumstances, and when the refusal does take place the aggrieved party has a right to expect sufficient reasons therefor.' Mr. Fish, Sec. of State, to Mr. Kirk, June 17, 1869, MS. Inst. Arg. Rep. XV. 317.

"When Mr. Nelson, American minister to Spain, arrived at Cadiz in 1823, he was unable to enter owing to the blockade of the port by a French squadron. (Moore, Int. Arbitrations, V. 4505–4506.)"

Moore's Digest, vol. 7, pp. 854, 855.

On the outbreak of the Spanish-American War in 1898, "the British Government expressed the desire to send a vessel of war to Havana and a gunboat to visit Santiago de Cuba, the proposed visit to be

made solely for the purpose of giving any necessary advice or assistance to the British consular officers, and not to be prolonged beyond the time required to effect that object. The Secretary of the Navy, in compliance with this request, telegraphed the commander in chief of the United States naval forces on the Atlantic station to afford facilities as far as possible for the ships in qeustion. Their names were subsequently furnished by the British ambassador. (For. Rel. 1898, 974–975.)"

Moore's Digest, vol. 7, p. 854.

"July 15, 1898, the Department of State addressed to all the foreign representatives in Washington a circular in relation to the entrance of neutral men-of-war into blockaded ports. In this circular it was stated that while there was no disposition on the part of the Government 'to restrict the courteous permission heretofore accorded to neutral men-of-war to enter blockaded ports, it is advisable that all risk of error or mischance should be avoided by due attention to the rules prescribed by prudence as well as by courtesy. To this end, a neutral man-of-war desiring to enter or to depart from a blockaded port should communicate with the senior officer of the blockading force.' As to the port of Havana, it was said to be 'advisable that neutral men-of-war * * * should, besides observing the above suggestions, approach the port from points between north by west and north by east, and follow the same general course in departing,' for the reason that, as the commanding officer was stationed north of Morro, 'such a course would enable vessels readily to communicate with him, and thus not only attend to the matter of proper naval ceremonial, but also to avoid the danger of a neutral man-of-war being mistaken for an enemy in the dusk or in thick weather.'

"The receipt of this circular was acknowledged by the different members of the diplomatic corps, and in no instance was objection then or subsequently made to its contents. On the contrary, the German Government presented certain counter suggestions, of a more stringent nature, which were accepted by the United States as embodying an arrangement for the future. The rules thus agreed on were as follows:

"1. That the consent of the blockading Government, obtained through the usual diplomatic channels, should, unless in a case of exceptional urgency, be a prerequisite to the entrance of a neutral man-of-war into a blockaded port.

"2. That approach to the blockaded port should be made in such manner that the senior officer of the blockading squadron would with certainty identify the neutral vessel, on her appearance in the blockaded belt, as the vessel of whose coming he had been notified.

"3. That in exceptional cases, such as prevented the obtaining of previous permission through the usual diplomatic channels, the decision should rest with the senior officer present of the blockading squadron.

"4. That in the departure from a blockaded port no special formalities were requisite other than might be necessary to identify the departing neutral, such formalities to be agreed on by her commander and the officer in command of the blockade. For. Rel. 1898, 1159–1169."

Moore's Digest, vol. 7, p. 853.

BLOCKADE MAY BE WAIVED IN FAVOR OF NEUTRAL VESSEL IN DISTRESS.

In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.— *Article 19, Declaration of London, 1909.*

"Distress can explain the entrance of a neutral vessel into a blockaded place, for instance, if she is in want of food or water, or needs immediate repairs. As soon as her distress is acknowledged by an authority of the blockading force, she may cross the line of blockade; it is not a favor which she has to ask of the humanity or courtesy of the blockading authority. The latter may deny the state of distress but when once it is proved to exist, the consequence follows of itself. The vessel which has thus entered the blockaded port will not be obliged to remain there for the whole duration of the blockade; she may leave as soon as she is fit to do so, when she has obtained the food or water which she needs, or when she has been repaired. But the leave granted to her must not be made an excuse for commercial transactions; therefore she is forbidden to discharge or ship any cargo.

It is needless to say that a blockading squadron which insisted on preventing a vessel in distress from passing, might do so if she afforded her the help which she needed."

General report of drafting committee to London Naval Conference.

"Article 40. However merchant vessels are permitted to enter, in case of stress of weather, the blockaded port, but only after the officer in charge of the blockade has ascertained that the *force majeure* continues."

Institute (1882), p. 53.

A blockaded port may be entered on account of "a physical necessity, arising from the immediate need of water, or provisions, or repairs, produced by stress of weather, which leave no other alternative for safety. 'But as, in order to cover a real design to dispose of a cargo,' says Mr. Duer, [Duer, On Insurance, vol. I, pp. 678, 679] 'the pretext of a necessity is easily framed, the excuse is necessarily liable to great suspicion, and, in all cases, as justly subject to a rigid scrutiny. Hence, it is established that the evidence relied on must clearly show an imperative and overruling compulsion to enter the particular port under blockade. It is not enough that it appears that there were existing and adequate causes to justify the ship in deviating from her voyage, to an intermediate port of necessity. It must also appear that she could not have proceeded, without hazard, to any other port than that blockaded, and that in no other port to which she could have proceeded, could her necessary wants have

been supplied. In short, the necessity that alone can save her, when captured, from condemnation, must be evident, immediate, pressing, and, from its nature, not capable of removal by any other means than by the course she had adopted.'"

Halleck, p. 559.

"If a vessel is driven into a blockaded port by such an amount of distress from weather or want of provisions or water as to render entrance an unavoidable necessity, she may issue again, provided her cargo remains intact. And a ship which has been allowed by a blockading force to enter within its sight, is justified in assuming a like permission to come out; but the privilege is not extended to cargo taken on board in the blockaded port."

Hall, p. 737.

"According to the practice which has hitherto been quite general, whenever a vessel either by need of repairs, stress of weather, want of water or provisions, or upon any other ground was absolutely obliged to enter a blockaded port, such ingress did not constitute a breach of blockade. On the other hand, according to the British practice at any rate, ingress did not cease to be breach of blockade if caused by intoxication of the master, ignorance of the coast, loss of compass, endeavour to get a pilot, and the like, or an attempt to ascertain whether the blockade was raised. * * *

"It has, however, to be kept in view that article 7, firstly, does not define the term *circumstances of distress*, and, secondly, makes it a condition that the circumstances concerned must be acknowledged by an officer of the blockading force. Everything is, therefore, *prima facie* at any rate, left to the consideration of the respective officer. A vessel in distress will have to signal to the man-of-war of the blockading force which she meets within the area of operations that she intends to enter the blockaded port, and the commander of the man-of-war will have to convince himself that circumstances of distress really exist, and that no fraud is intended. The commander may deny the condition of distress, and then the vessel may not proceed, although the State whose flag she flies may ask for indemnities in case there really was distress and the vessel was lost or damaged by not being allowed to enter the blockaded port. On the other hand, when once the commander of the man-of-war has acknowledged that the respective vessel is in a condition of distress, it is not in his discretion, but he is in duty bound, to allow her to enter the blockaded port." * * *

"The International Prize Court will, if established, have to develop a more detailed practice concerning the matter."

Oppenheim, vol. 2, pp. 472, 473, 474.

Art. 135, Holland's Naval Prize Law, provides that "the only excuses which justify a Breach of the Blockade are:

"1. Absolute necessity, as where stress of weather and want of provisions compel the Vessel to put into port, and the only accessible ports are those under Blockade. * * *"

Holland cites in support The *Hurtige Hane*, 2 C. Rob. 124; The *Fortuna*, 5 C. Rob. 27; The *Charlotta*, Edwards, 252.

Article 30 of the Japanese Regulations relating to Capture at Sea, 1904, provides that a vessel shall be exempt from capture:—

"When, on account of * * * lack of provisions or other unavoidable causes, the necessity arises for a ship to put into port, and there being no other port or bay at which she can call, she enters the blockaded area."

"63. A neutral ship in distress has the right, after communicating with a commander of the blockading force to enter a blockaded port, and later to leave it, upon condition, that cargo shall be neither discharged, nor taken on there. The blockading force can instead, however, itself extend the assistance of which the ship is in need."

German Prize Rules, 1909.

"81. A neutral vessel, in case of distress vouched for by an authority of the blockading forces, may enter the blockaded locality and leave later, on condition of not having left nor taken any cargo there."

French Naval Regulations, 1912.

Article 7 of the Declaration of London, 1909, substantially appears as Art. 88 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"During the blockade of Port Royal in 1861 a Spanish steam vessel, with the permission of the commander of the blockading squadron, put into that port in distress, and was there seized as prize of war, and used by the Government till June, 1862, when she was brought to New York and condemned. In June of the following year, however, the Government in the meantime using the vessel, a decree of restitution was ordered; but the vessel never was restored. Subsequently the case was referred to a commissioner to ascertain the damages for the seizure and detention, and final judgment was rendered by the court on his award. This judgment was reversed[1] on account of the impropriety of one of the items included in the decree of the district court. But it was held that clearly the vessel was not lawful prize of war or subject to capture, and that her owners were entitled to fair indemnity, though it might well be doubted whether the case was not more properly a subject of diplomatic adjustment than of determination by the courts."

Moore's Int. Law Digest, vol. 7, p. 832.

The *Hurtage Hane* (1709) (2 C. Rob. 124), was captured for breach of the blockade of Amsterdam while going into the Texel. The excuse of dire necessity was set up. Sir William Scott said: "I will not say that cases of necessity may not occur, that would afford a sufficient justification [to enter a blockaded port]; and I add, that if the party can show that they were under any great necessity, and that, for four or five days before, they could get into no other port but the Texel, I would certainly admit such an excuse, so supported. But if they cannot do this, and unless it is proved, that in coming up the channel there was no other port, either English or French, but the interdicted port of Amsterdam, into which they could put, I shall reject the apology."

[1] The *Nuestra Senora de Regla*, 17 Wall., 29.

On further proof being offered the owners failed to show the compelling necessity and the ship was condemned.

In the case of the *Fortunas* (1803) (5 C. Rob. 27), the ship was captured for breach of blockade of the Weser. Her excuse was that she put in on account of lack of provisions and also by reason of strong adverse winds. In respect to this excuse Sir William Scott said: "The want of provisions is an excuse which will not on light grounds be received: because an excuse, to be admissable, must show an imperative and overruling compulsion to enter the particular port, under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighboring port, but it can hardly ever force a person to resort exclusively to the blockaded port. What is stated, respecting the wind is of a different matter. It is said, 'that there had been a strong westerly wind blowing for nine days together, which prevented the master from making his course to the Eems.' This is a fact that may admit of specific evidence, and therefore I shall admit affidavits to be offered on that point." On further evidence being produced, the ship was restored.

In the case of the *Charlotte* (1810) (Edw. 252), Sir William Scott held that a neutral merchant vessel that had been compelled to enter a blockaded port on account of stress of weather and that had been captured on her way out, having still on board the cargo that she carried on her entry, was not liable to condemnation for breach of blockade.

In the case of the *Forest King* (1861) (Blatch. 45, 596), the vessel was captured for breach of blockade of Key West. The contention was made that the vessel had gone into the port for supplies or stores, at the suggestion of the vessels of the blockading squadron. In doing this the court held that there was no evasion of the blockade. "This is recognized by Lord Stowell as a fair and reasonable excuse for the entering of a blockaded port (The *Neptunus*, 2 Ch. Rob., 110) by a vessel acting in good faith on such notice; and as no claim for further proof has been made to the court to correct or impeach the testimony to this point, I shall accept the statement as true, and presume that the schooner was taken by her master into Key West for the purpose of obtaining supplies necessary to the voyage. Neither he nor his mate seems to have been required, on the preparatory examinations, to specify the wants of his vessel at Key West, or whether or not they were obtained by her. I must, on the case as it stands, regard the object of her visiting Key West as admitted to be that stated by the witnesses in their examination *in preparatorio*. The visit was for an allowable object, and the doings of the master do not therein compromise the safety of the vessel. The extra extent of the voyage to be performed renders probable the assertion that the vessel required further stores, and, at all events, removes the suspicions that generally apply to such excuses. (The *Fortuna*, 5 Ch. Rob., 27; The *Hurtige Hane*, 2 Id., 124.)"

In the case of the *Argonaut* (1861) (Blatch. 62), a neutral vessel with a neutral cargo was captured off a blockaded port for alleged breach of blockade. Evidence was submitted that the vessel was on a lawful voyage, had run short of material supplies, had deviated from her true course for the purpose of attempting to obtain the needed supplies from other vessels.

In this situation the vessel was released, the court saying: "I perceive no reason to doubt, on all the facts and circumstances in proof, that the master of the vessel and her supercargo acted under an honest conviction that the necessities of the vessel required she should obtain the supplies lost to her in order to continue the voyage safely, and were governed in their proceedings by that motive, and not by an intent to violate the blockade of the port which she sought to enter and near which she was seized. Although the condition of the vessel relieves her from confiscation because of the effort of the master to enter a blockaded port for the purpose of relieving her necessities, yet excuses of that kind are looked upon with marked distrust by prize courts, who scan them cautiously. Lord Stowell holds that nothing but a high necesity justifies an attempt to enter a blockaded port, (The *Hurtige Hane*, 2 Ch. Rob., 124,) and that slight and plausible excuses will not be listened to, (The *Fortuna*, 5 Ch. Rob., 28;) and the want of provisions is referred to as a simulated reason often set up in excuse of the offence. Still, when the necessity is actual and is the motive which governs the conduct of the master, the vessel will be exonerated from the severe penalty which the act of breaking a blockade incurs."

In the case of the *Major Barbour* (1862) (Blatch. 167), the claim was made that the captured vessel entered the blockaded harbor on account of necessity due to weather.

The court held that the evidence submitted was not sufficient to justify the breach, saying:

"The question, whether the vessel was off her due course when arrested because of stress of weather, or other necessity compelling or justifying it, or whether she made a deviation intentionally, and under circumstances importing culpability on her part, is of moment on the issue between the parties. The master and mate differ broadly in their testimony on the point, and they speak positively upon a personal knowledge of the facts * * * but it is evident, from the log and the testimony of the mate, that the storm or leaking of the ship in no way compelled him to seek shelter in Caillou bay. The gale had ceased, and moderate weather had prevailed for more than two days prior to her attempt to do so; and the antecedents of the vessel and the character of her lading supply strong suspicions against the integrity of her movements. There is more weighing against them than the suspicions ordinarily recognized in prize courts, as violent presumptions affecting the innocency of a bottom unquestionably neutral in its character, which claims to be excused for seeking a blockaded port for necessary repairs, supplies, or shelter. An act done clearly from necessity, and fairly and with good faith, in entering a blockaded port, will be excused; but such allegations are regarded with distrust, and satisfactory evidence is demanded of the reality and urgency of the necessity, (The *Arthur*, Edw., 202; The *Fortuna*, 5 Ch. Rob., 27; The *Christiansberg*, 6 Ch. Rob., 376). In this case, the evidence shows that the attempt to enter the blockaded port was not compelled by any suffering or peril of the vessel or cargo. It was made in calm weather, two days after the cessation of any dangerous wind, or any evidence, from the pumps of the vessel, or otherwise, that she had sustained any positive injury in the gale; and the peril seems to have been unnoticed and unknown by the mate and seaman, or any one else having the management

of the vessel. The alarms of the two passengers rested upon no facts, and were founded on their ignorance and timidity alone; and the testimony of the master, as to the state of the vessel, and the cause of her proximity to the blockaded coast, affords no satisfactory justification for her efforts to that harbor."

In the case of the *Albert* (1863) (Blatch. 663), a neutral vessel on alleged voyage from a neutral port to New York, was captured while off her regular course and on a course for a blockaded port. The court said: "The excuse set up is, that the vessel encountered great stress of weather and head winds. But it does not appear that she was in any way disabled or crippled, or that any reason existed for seeking to enter the port of Charleston. The whole of the proofs satisfy me that the excuse set up is without any meritorious foundation, and does not reasonably explain the suspicious position of the vessel. She had been previously warned not to enter the port, as it was in a state of blockade, and the warning is noted on her papers. The court below condemned the vessel and cargo. I think that the decree was right and should be affirmed."

The *Cornelius* (1865) (3 Wall., 214) was a vessel owned by citizens of the United States. She was chartered for a voyage from New York to Port Royal, S. C., which place was at the time open to trade. On her way down she lingered all night off Bull's Bay from which the blockaded port of Charleston may be easily reached. After arriving at Port Royal she remained there for several months and then, without unloading cargo, cleared for New York. Her departure was timed so as to arrive off Bull's Bay at night. She was sighted off this place by one of the blockading fleet and fired at. Instead of stopping and awaiting the approach of the naval vessel, she attempted to escape. Finding escape was impossible she ran ashore. On being boarded, her master claimed she was in a leaky condition and had to be beached to prevent sinking.

On this statement of facts the vessel and cargo were condemned as good prize, the court saying: "Her voyage was again timed so as to reach the entrance to Bull's Bay in the night, but owing to her leaking condition it was about daylight when she came in sight of the blockading force. About that time she passed the *Restless*, was fired at from that vessel several times, paid no attention to the fire except to put on more sail, was pursued by the boats of the *Restless*, and was run aground and captured five or six miles inside her station. The excuse set up by the master for this conduct, is his desire to beach his vessel and save her and her cargo, because she was in a sinking condition. It is shown by the testimony of the master himself, that he had her bottom examined, and knew its condition before he left Port Royal. It can hardly be believed from his own statement on that subject, that he intended to risk her for the full voyage to New York when he started. Again, his obvious duty, and his safest course every way, was to approach the *Restless*, explain his condition, and ask for assistance. This duty he avoided, though he had full knowledge of the blockade, and when admonished by the shot from the *Restless*, he made every effort to escape by crowding sail and running in toward the blockaded port. The excuse set up of a desire to save his vessel and cargo without subjecting her to salvage, would not be sufficient if the case stood alone on the facts connected with her voyage

from Port Royal. In the language of Sir William Scott, in The *Charlotte Christine*, (6 Rob., 101), although 'it is a possible thing that his intention was innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intention.' But when these are considered in connection with the facts already stated, tending to show an intention to run the blockade from the inception of the adventure, we entertain no reasonable doubt of the guilty purpose which carried her into Bull's Bay at the time of capture. Of course the attempt to violate the blockade was made in the interest of the cargo."

In the *Diana* (1868) (7 Wall. 354), the court said: "It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. 'Nothing less,' says Sir William Scott, 'than an uncontrollable necessity, which admits of no compromise, and cannot be resisted,' will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretences of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose."

A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.—*Article 8, Declaration of London, 1909.*

"Independently of the condition prescribed by the declaration of Paris that it must be effective, a blockade, to be binding, must be declared and notified. Article 8 confines itself to laying down the principle which is applied by the following articles.

To remove all possibility of misunderstanding it is enough to define clearly the meaning of these two expressions, which will frequently be used. The declaration of blockade is the act of the competent authority (a government or commander of a squadron) stating that a blockade is, or is about to be, established under conditions to be specified (art. 9). The notification is the fact of bringing the declaration of blockade to the knowledge of the neutral powers or of certain authorities (art. 11).

These two things—declaration and notification—will in most cases be done previously to the enforcement of the rules of blockade, that is to say, to the real prohibition of passage. Nevertheless, as we shall see later, it is sometimes possible for passage to be forbidden by the very fact of the blockade which is brought to the knowledge of a vessel approaching a blockaded port by means of a notification which is special, whereas the notification which has just been defined, and which is spoken of in article 11, is of a general character."

General report of drafting committee to London Naval Conference.

"It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. This information may be communicated to him in two ways; either actually, by a formal notice from the blockading power; or constructively, by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists, and he has knowledge of it, he is bound not to violate it. * * * The question of notice is a question of evidence, to be determined by the facts applicable to the case. The notoriety of a blbockade is of itself sufficient notice of it to vessels lying within the blockaded port. In the case of the *Adelaide* [2 C. Rob. 111], it was the doctrine of the English admiralty, that a notification given to one state must be presumed, after a reasonable time, to have reached the subjects of neighboring states, and it affects them with the knowledge of the fact, on just grounds of evidence. And after the blockade is once established, and due notice received, either actually or constructively, the neutral is not permitted to go to the very station of the blockading force, under pretense of inquiring whether the blockade had terminated, because this would lead to fraudulent attempts

to evade it, and would amount in practice to a universal license to attempt to enter, and on being prevented, to claim the liberty of going elsewhere. Some relaxation was very reasonably given to this rule, in its application to distant voyages from America; and ships sailing for Europe, before knowledge of the blockade reached them, were entitled to notice, even at the blockaded port If they sailed after notice, they might sail on a contingent destination for the blockaded port, with the purpose of calling for information at some European port, and be allowed the benefit of such a contingent destination, to be rendered definite by the information. But in no case is the information as to the existence of the blockade to be sought at the mouth of the port."

Kent, Vol. I, p. 153.

"The breach of a blockade is viewed, in all cases, as a criminal act; this necessarily implies a criminal intent, and to constitute such intent, a knowledge of the existence of the blockade, and an intention to violate it, are indispensable."

Halleck, p. 548.

"As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party *merely* in consequence of such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated."

Wheaton, p. 676.

"As a blockade arises from some positive act and not from a mere intention, as it is a temporary, and, it may be, an often-repeated measure, and as a neutral is, in general, innocent in endeavoring to enter any port in his friend's territory, it is manifest that in order to become guilty, he must have had the means of obtaining due notice of the new state of things which a blockade has occasioned."

Woolsey, p. 345.

"As a blockade is not a necessary consequence of a state of war, but has to be specially instituted, it would evidently be impossible to assume that a neutral possesses any knowledge of its existence until the fact of its establishment has been in some manner notified or brought home to him. So far not only is the general rule as a matter of fact agreed upon, but it could not stand otherwise. But opinions differ widely as to whether it is sufficient in order to justify the belligerent in seizing the property of the neutral that the knowledge of the latter shall be proved, or whether a formal notification must be served upon him.

"According to the view which finds its expression in English and North American practice, and which is adopted also by Prussia and Denmark, the source of liability to seizure is knowledge of the fact that a blockade has been established, together with the presumption that an existing blockade will under ordinary circumstances continue. A neutral therefore who sails for a port with full knowledge that it is blockaded at the moment when his voyage is commenced, ought to expect that it will be in the same state when he arrives; and anything

which can be proved to affect him with knowledge at the former time will render him liable to the penalties imposed for violation of blockade.

"On the other hand, according to the view which is identified with French practice, and which is also followed by Italy, Spain, and Sweden, the neutral is not expected to shape his course on any presumption with respect to the continuance or cessation of a blockade; and he is not injuriously affected by knowledge acquired at any time before he can experimentally test its existence as good on the spot which is subjected to it.

"Hence, although it has lately become customary for the French Government at the commencement of a blockade to notify the fact of its existence to foreign governments as a matter of courtesy, their subjects are not considered to be affected by notice through them. Each neutral trader approaching the forbidden coast is individually warned by one of the blockading squadron, a vessel not engaged in the blockade being incompetent to affect the trader with notice, the fact of warning is endorsed on the ship's papers, with mention of the date and place of notification, and it is only for subsequent attempts to enter that the neutral is liable to seizure. The practice was consistently followed by France in blockading Mexican ports in 1838, and those of the Argentine Republic in the same year: it has been equally respected during her recent European wars: and stipulations in accordance with it are found in many modern treaties concluded by her, as well as in a certain number of conventions between other states. It is also adopted by several modern continental writers; who argue that to sail for a blockaded place in the hope of finding the entry freed by the chances of war, by the effects of weather, or by some other cause, is in itself an innocent act, and therefore not to be punished because the hope fails to be justified by the circumstances existing at the moment of arrival.

"The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sails with the destination of a blockaded port from a place at which the fact of blockade is so notorious that ignorance of its existence is impossible, confiscation may take place upon seizure without previous warning. But in practice notification of some sort is always given. If the blockade is instituted under the direct authority of the government, the fact of its commencement is always notified to foreign states. The information thus comunicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them. * * * And a mitigation of the strict rule is introduced when a vessel sails with full knowledge of the existence of a blockade from a port at a great distance from the closed harbours. The presumption in favour of continuance of the blockade is of necessity weakened with a lapse of time sufficient for the completion of a long voyage; and it was held during the wars at the beginning of the century that a vessel coming from America into European waters was not rendered liable to capture by mere destination to a blockaded port. Enquiry as to the continued

existence or suspension of the blockade was under these conditions justifiable; but it was held that such enquiry ought to be made, not at the blockaded port, but at intermediate places, where fraud was less likely to be masked under enquiry, than at the mouth of the blockaded harbour.

"The practice of England and the United States is unquestionably better suited than that of France to the present conditions of navigation. The electric telegraph and newspapers spread authentic news rapidly and universally: steam has reduced the length of voyages and rendered their duration certain; it can only be under rare circumstances, against the effect of which mitigations such as those introduced into English usage may easily provide, that a vessel will arrive innocently before a blockaded port. If capture for attempt to break a blockade is to be permissible at all, it must be morally permissible to capture under ordinary circumstances without individual notice, provided diplomatic, or other sufficient general, notice has been given; and if such capture is morally permissible, it is certainly to the advantage of neutral states to allow it to take place. Belligerents will not quietly suffer the results of commerce prejudicial to their warlike operations; and unless they are entrusted with weapons of sufficient strength to enable them to deal with it effectively, they will try, with more or less success, to throw responsibility upon the neutral states, to the confusion of legal distinctions which it is highly convenient to the latter to maintain, and to the vastly increased danger of national conflicts."

Hall, pp. 719–724.

"The Declaration of London not only reenacted the rule of the Declaration of Paris that a blockade to be binding must be effective, but added the further condition that it must be declared and notified. Great Britain had always recognised the necessity of conveying in some way to all concerned information of the existence of her blockades, and had in most cases made diplomatic notification of them. But she held that notoriety was equivalent to it, and regarded an effective blockade without notification as binding on neutrals, provided that the fact of its existence had become notorious in commercial circles. This doctrine of notoriety did not find much favor on the continent of Europe, and was in truth capable of undue extension. Communication is now so easy that we may welcome as improvements the new conditions of effectiveness. The now obligatory *declaration of blockade* must be issued either by a belligerent government or by a commander of a naval force acting on behalf of his state. * * * Declarations of blockade are not valid unless they are notified."

Lawrence, pp. 686–688.

"A declaration of blockade being 'a high act of sovereignty' and having far-reaching consequences upon neutral trade, it is generally recognised not to be in the discretion of a commander of a naval force to establish blockade without the authority of his Government. Article 9 of the Declaration of London precisely enacts that 'a Declaration of blockade is made by the blockading Power or by the naval authorities acting in its name.' The authority of his Government to establish a blockade can be granted to a commander of a naval

force purposely for a particular blockade, the Government ordering the commander of a squadron to blockade a certain port or coast. Or a Government can expressly delegate its power to blockade to a commander for use at his discretion. And if operations of war take place at great distance from the seat of Government and a commander finds it necessary to establish a blockade, the latter can become valid through his Government giving its immediate consent after being informed of the act of the commander. And, further, the powers vested in the hands of the supreme commander of a fleet are supposed to include the authority to establish a blockade in case he finds it necessary, provided that his Government acquiesces as soon as it is informed of the establishment of the blockade.

"A blockade is not in being *ipso facto* by the outbreak of war. And even the actual blocking of the approach to an enemy coast by belligerent men-of-war need not by itself mean that the ingress and egress of *neutral* vessels are to be prohibited, since it can take place for the purpose of preventing the egress and ingress of *enemy* vessels only. Continental writers, therefore, have always considered notification to be essential for the establishment of a blockade. English, American, and Japanese writers, however, have not hitherto held notification to be essential, although they considered knowledge on the part of a neutral vessel of an existing blockade to be necessary for her condemnation for breach of blockade."

Oppenheim, vol. 2, pp. 456, 457.

"ART. 126. A Blockade legally commences as soon as it is effectual, whether Notification has been made or not."

Naval Prize Law, Holland.

"ART. 39. The notification of a blockade must be made before neutral vessels can be seized for its violation. * * *"

United States Naval Code, 1900.

"57. Upon declaring a blockade, the naval commander must report as soon as possible to his superior and besides directly to the Chief of the Admiral Staff of the Navy. He must take all possible steps to make the fact of blockade known generally as quickly as possible."

German Prize Rules, 1909.

"59. To be legally binding, the blockade must be * * * declared and made known in the manner prescribed."

German Prize Rules, 1909.

"64. The declaration and publication of the blockade are made according to 65 to 71, 74, and 75."

German Prize Rules, 1909.

"67. A blockade, to be binding, should be declared in accordance with paragraph 68 and notified in accordance with paragraphs 69 and 77."

French Naval Regulations, 1912.

Article 8 of the Declaration of London, 1909, substantially appears as Art. 89 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"On April 10, 1825, the Mexican minister at Washington requested the Department of State to give notice of the blockade of the castle of San Juan d'Ulloa by the Mexican forces. 'He was informed that such a notification from a neutral was not according to the usage of nations. It is not necessary to the legality of a blockade maintained by a competent force and otherwise conforming to the law of nations that its existence should be promulgated by a neutral.' Mr. Clay, Sec. of State, to Mr. Neale, Oct. 25, 1825, 21 MS. Dom. Let. 174."

Moore's Digest, vol. 7, p. 823.

"The seizure and detention of American vessels with their crews and property for attempting to enter ports, due notice of the blockade of which has not been given, will be regarded 'as an act of hostility and wrong for which the prompt release of the vessels and crews, restitution of the property, and other suitable redress will be insisted upon.' Mr. Bayard, Sec. of State, to Mr. Preston, Haitian min., Oct. 29, 1888, For. Rel. 1888, I. 990."

Moore's Digest, vol. 7, p. 825.

"The British steamer *Adula* having been captured on June 29, 1898, by a United States cruiser, on a charge of attempt to break the blockade of Guantanamo, Cuba, it appeared that no blockade was ever proclaimed of that place by the Government of the United States, Guantanamo being east of the line established by the President's proclamation of the 27th of June. But it also appeared that blockades of Santiago and Guantanamo were in fact established by Admiral Sampson early in June, and were maintained till some days after the capture of the *Adula;* and, in view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, the court thought these blockades must be held to have been lawfully instituted, as an adjunct to such operations. The *Adula*, 176 U. S. 351, affirming 89 Fed. Rep. 351."

Moore's Digest, vol. 7, p. 784.

"Near the close of hostilities between the United States and Spain, in 1898, an attempt was made to establish a de facto blockade of the port of Sagua le Grande, on the north side of Cuba, beyond the limits of the blockade proclaimed by the Government of the United States, but the attempt was abandoned under orders from Washington, and certain vessels which had been seized, ostensibly in connection with it, were released. The French steamer *Manoubia* was supposed to fall within this category, but in reality she appears to have been seized, not for any breach of blockade, but on suspicion of 'acting in the interest of the enemy.' August 10, 1898, the Navy Department telegraphed that it was considered best for a few days not to extend the blockade beyond what had been proclaimed, and added: 'Beyond these limits be very careful not to seize vessels, unless Spanish or carrying contraband of war, as neutrals have a right to trade with ports not proclaimed blockaded.'"

Moore's Digest, vol. 7, p. 784. See also Naval Operations of the War with Spain, pp. 259, 280, 298.

A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

(1) The date when the blockade begins;

(2) The geographical limits of the coastline under blockade;

(3) The period within which neutral vessels may come out.—*Article 9, Declaration of London, 1909.*

"The declaration of blockade in most cases emanates from the belligerent government itself. That government may have left the commander of its naval forces free himself to declare a blockade according to the circumstances. There will not, perhaps, be as much reason as formerly to give this discretion, because of the ease and rapidity of communication. This, being merely an internal question, matters little.

"The declaration of blockade must specify certain points which it is in the interest of neutrals to know, in order to be aware of the extent of their obligations. The moment from which it is forbidden to communicate with the blockaded place must be exactly known. It is important, as affecting the obligations both of the blockading power and of neutrals, that there should be no uncertainty as to the places really blockaded. Finally, the custom has long been established of allowing neutral vessels which are in the blockaded port to leave it. This custom is here confirmed, in the sense that the blockading power must allow a period within which vessels may leave; the length of this period is not fixed, because it clearly depends on very varying circumstances, but it is understood that the period should be reasonable."

General report of drafting committee to London Naval Conference.

"Article 36. The declaration of blockade should determine not only the limits of the blockade by latitude and longitude, and the exact moment when the blockade will begin, but also, in the proper case, the period which may be allowed merchant vessels to unload, reload and leave the port (Article 7)."

Institute (1882), p. 52.

"According to modern usage, a blockade does not rightfully extend to a neutral vessel found in port when the blockade was instituted, nor prevent her coming out with the cargo bona fide purchased, and laden on board before the commencement of the blockade. [The *Betsey*, 1 C. Rob. 93; The *Vrouw Judith*, 1 C. Rob. 150; The *Comet*, Edw. 32; Olivera *v.* Union Ins. Co., 3 Wheat. 183.] The modern practice does not require that the place should be invested by land, as

well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communication." [The *Ocean*, 3 C. Rob. 297; The *Stert*, 3 C. Rob. 299, note.]

Kent, Vol. 1, p. 152.

The establishment of a blockade "is a high act of sovereignty and must proceed, either directly from the government of the state or from some officer to whom the authority has been expressly or impliedly delegated. * * * The commander of a fleet, * * * on a distant station, may be reasonably presumed to carry with him the authority as the exigencies of the service on which he is employed, under the varying circumstances of the war, would often seem to require its exercise. His authority in such cases, is, therefore, implied from the nature of the service. But where the station of the * * * fleet is so near the government of the belligerent state as to enable the commander to receive direct and special instructions, it would seem that the necessity of presuming power in the officer does not exist, and it has been suggested by some, that it is the duty of the commander, in such a case, if his authority should be questioned, to justify his acts by express proof of the instructions of his government. The weight of authority, however, is in favor of the rule that a neutral individual is never at liberty to impeach the regularity of a seige or blockade, otherwise valid, by questioning the authority of the officer by whom it was established or is enforced. The officer is undoubtedly answerable to his own government, for any irregular or unauthorized acts, but so long as they are acts of legitimate hostility, it is not open to a neutral state or its subjects, under any circumstance, to dispute their validity. The orders of his government are known only to that government and the officer, and cannot be inquired into by third parties. If he has acted without orders, and his acts are subsequently adopted and ratified, such ratification supplies the want of an original authority, and precludes all further inquiry. But if the act is disavowed by the government of the belligerent state, or if it can be proved that the officer exceeded his actual authority, such disavowal or excess may be urged as a valid defense. Where a blockade has been declared by the government, the commander of the blockading squadron has no discretionary power to extend its limits; and if he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the warning is illegal, and no penalty is incurred by the neutral master by whom it is disregarded."

* * * * * * *

A public notification "is usually in the form of an official communication from the belligerent to the authorities of neutral states. It may be a notice that a certain port will be blockaded on and after a certain date, or that it is the intention of the belligerent to proceed to blockade certain ports or harbors. The latter form being indefinite as to time would require a subsequent notice of the commencement or time of the actual blockade. Sometimes several notifications are given, such as a notice of intention, a subsequent notice of the sailing of the naval forces for the purpose of carrying that intention into execution, and finally a notice of the actual commencement of

the blockade. The two former are given as a matter of courtesy, for the information of neutrals. The French have held that a general *diplomatie* notice is not sufficient to charge parties with a knowledge of a blockade, but there must be an actual notice by the blockading force. This doctrine was distinctly announced by Count Molé in his letter of October 20th, 1838, to the French minister of marine, in relation to the French blockade of Vera Cruz, Mexico, and is strenously advocated by Ortolan and other French writers on international law. As already remarked, British writers and British courts of admiralty regard a public or diplomatic notice of a blockade, as, by construction of law, a direct, personal notice, to each inhabitant of the state so notified. * * *

"Instead of a direct official notification to a neutral government of the establishment of, or intention to institute, a blockade of a particular port, a general notice to that effect is sometimes given by official publication in the newspapers. By this means information is distributed among the mercantile community more generally and expeditiously than through the ordinary channels of official communication with the neutral government. Thus, where the vessel intercepted is destined to a blockaded port, and there is clear and positive proof that the existence of the blockade was generally known at her port of departure when she sailed, neither the master nor his owners, nor the shippers of the goods, will be permitted to aver their personal ignorance of that which it is scarcely possible they should not have known, or, at any rate, by due inquiry might have ascertained. To allow proof of personal ignorance in such a case, by admitting the affidavits of the master or his crew, would be a direct invitation to perjury and fraud." * * *

The notification of warning of blockade "to be binding * * * must be clear, and not so ambiguous or insiduous as to be calculated to mislead the neutral master, otherwise it is illegal and void. Where it is expressed in such general terms as to embrace other ports not blockaded, it is not even valid as to the blockaded port, although included in the general language. Where the notice is irregular and insufficient, no penalty is incurred by its contravention."

Halleck, pp. 536, 537, 549–552.

Neutral Rights and Duties Respecting Egress.

"As to violating a blockade by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port. The *Betsey*, 1 Rob. 93; The *Frederick Molke*, id. 72; The *Neptunus*, id. 170. A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade: if she afterwards take on board a cargo, it is a violation of the blockade. The *Vrouw Judith*, id. 1 Rob. 150; The *Rolla*, 6 Rob. 364. Where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have vio-

lated the blockade. The *Potsdam*, 4 Rob. 89; The *Juffrouw Maria Schroeder*, id. note (a). But a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed from thence on a voyage to the neutral country, was held liable to condemnation. The *General Hamilton*, 6 Rob. 61. And where the vessel was captured on a voyage to the blockaded port, in ballast, she having sailed for the purpose of bringing away goods which had become the property of neutral merchants before the date of the blockade, she was held liable to condemnation. The rule of blockade permits an *egress* to ships innocently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of *ingress*, there is not the same reason for indulgence; there can be no surprise upon the parties, and, therefore, nothing short of a physical necessity is admitted as an adequate excuse for making the attempt of entry. The *Comet*, Edwards, 32. A marine blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation of the country. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The *Ocean*, 3 Rob. 297; The *Stert*, 4 Rob. 65. But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, and under charter-party with the ship proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. The *Maria*, 6 Rob. 201. The penalty for a breach of blockade is remitted by the raising of the blockade between the time of sailing from the port and the capture. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*. The *delictum* completed at one period is by subsequent events entirely done away. The *Lisette*, 6 Rob. 387. A neutral ship coming out of a blockaded port in consequence of a rumour that hostilities were likely to take place between the enemy and the country to which the ship belongs is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast. The *Drie Vrienden*, Dodson, 269. But the danger of seizure and confiscation by the enemy, must be immediate and pressing. The mere apprehension of possible and remote danger will not justify bringing a cargo out of a blockaded port. The *Wasser Hundt*, id. 270, note."

Wheatons's note to Olivera *v.* Union Ins. Co. (1818), 3 Wheaton, 183, 196, 198.

The establishment of a blockade is "so high an exercise of sovereign power that it can only be effected under the express or implied orders of the government of a country; and the general instructions given to the commander of a belligerent force do not necessarily imply competent orders. If however he is operating at a considerable distance from home, he is supposed to be invested with such portion of the sovereign authority as may be required for the exigencies of the service; and it has even been held that when an officer not possessed of adequate powers had taken on himself to commence a blockade, captures effected under it might be made retrospectively valid by a subsequent adoption of his act by the state. The principle therefore in

practice goes little further than to forbid subordinate officers from creating or varying a blockade at their will."

Hall, p. 725.

"It is generally recognised that a blockade cannot extend beyond the area covered by the operations of the force which maintains it. This principle was laid down in the case of the *Stert* (4 C. Rob. 65). The court held that goods coming from a blockaded port by means of interior canal navigation which was perfectly open were free from hostile seizure."

Lawrence, p. 685.

Days of Grace.

The third paragraph of Article 9 "is important, as it turns what was previously custom into law. Blockading powers have been wont to allow a period within which vessels found within a port at the commencement of the blockade might leave it, the length of time granted varying with circumstances and the will of the blockading authorities. In future they must make the grant, though their option with regard to its extent is not taken away. The usual, though by no means invariable, British practice is to give fifteen days, which was the time allowed when England and Germany instituted a joint blockade of Venezuelan ports in 1902. In 1898 the United States allowed neutral vessels thirty days to leave the blockaded Cuban ports." * * *

Whether this provision "covers cargo also is doubtful. Practice has varied from exit in ballast to exit fully laden, contraband goods alone being forbidden. In the Cuban blockade of 1898 the American courts construed the grant of thirty day's grace as a permission to come out with cargo laden within that period, and President McKinley confirmed this interpretation in his Proclamation of June 27, 1898, extending the original blockade to other Spanish ports. The Declaration of London imposes on belligerents no obligation to permit ingress for a limited period after the commencement of a blockade; but they have sometimes granted it as an indulgence, and will in all probability continue to do so in hard cases. When Great Britain and Germany established in December, 1902, a joint blockade of part of the Venezuelan coast-line, they allowed ingress to neutral vessels which had sailed for the closed ports before the notification of the blockade, during a time varying with the distance to be traversed and the character of the vessel as a steamer or a sailing ship."

Lawrence, pp. 687 and 695.

Days of Grace.

"As regards *ingress*, a blockade becomes valid the moment it is established; even vessels in ballast have no right of ingress. As regards *egress*, it has always been usual for the blockading commander to grant a certain length of time within which neutral vessels might leave the blockaded ports unhindered, but no rule existed respecting the length of such time, although fifteen days were frequently granted. This usage of granting to neutral vessels a period within which they may leave the blockaded port, has been made a

binding rule by the Declaration of London. For, since article 9 enacts that a declaration of blockade must specify the period within which neutral vessels may come out, it implicitly enacts that the granting of such a period is compulsory, although it may only be long enough to enable neutral vessels to make their way out as quickly as possible."

Oppenheim, vol. 2, p. 459.

"Although a blockade may be established on his own authority by the belligerent commander on the spot, he more usually establishes it on the instructions of his government, which notifies expressly to neutral powers, as well as announces in some public manner at home, the blockades which it directs, or which it adopts on information being given of them by its commanders. The notification or announcement is not sufficient without the reality of the blockade, but it is important on the question of the knowledge which is necessary for culpability."

Westlake, vol. 2, pp. 268, 269.

Days of Grace.

"In all recent wars a time has been fixed by the blockading government within which neutral vessels may leave the port with their cargoes, and even after that time they may leave in ballast or with cargoes loaded on board before the commencement of the blockade."

Westlake, vol. 2, p. 271.

"ART. 122. In order that the Notification of the Blockade may be duly made, the Commander of the Squadron should draw up a Declaration, specifying—

"1. What are the Ports or what is the line of seaboard under Blockade.

"2. Upon what day the Blockade was instituted. * * *"

Naval Prize Law, Holland.

"ART. 130. A Breach of the Blockade Outwards is committed by any Vessel which, whether with cargo or in ballast, passes, or attempts to pass, out of the Blockaded Port, except

"1. A Vessel, in ballast, which was in the Blockaded Port at the time when the Blockade was first instituted.[1]

"2. A Vessel, in ballast, which entered during the Blockade, provided her Master was ignorant of the Blockade or had received express permission to enter from the Blockading Squadron.

"3. A Vessel, with cargo, provided that *the whole* was put on board before the institution of the Blockade;[2] and if the whole has been put on board before the institution of the Blockade, no Breach is committed if any part of such cargo, for the purposes of navigation, be afterwards transferred from the Vessel into lighters, and so sent out of the Blockaded Port for re-shipment in the same Vessel.[3]

"In any of the above excepted cases the Commander should permit the Vessel to pass, after inscribing on her Log, and also upon the Document certifying her Nationality, a Memorandum of the

[1] "*Frederick Molke*, 1 C. Rob. 86."
[2] "*Vrouw Judith*, 1 C. Rob. 150."
[3] "*Otto and Olaf*, Spinks, 257."

Visit and of the ground on which she was considered not liable to Detention."

Naval Prize Law, Holland.

"ART. 39. * * * The notification of blockade should declare, not only the limits of the blockade, but the exact time of its commencement and the duration of time allowed a vessel to discharge, reload cargo, and leave port."

United States Naval Code, 1900.

"ART. 43. Neutral vessels found in port at the time of the establishment of a blockade, unless otherwise specially ordered, will be allowed thirty days from the establishment of the blockade, to load their cargoes and depart from such port."

United States Naval Code, 1900.

"ART. 22. When a blockade is established, the commander of the blockading fleet or warship shall issue a declaration stating the area and the date of enforcement of the blockade."

Japanese Regulations, 1904.

"ART. 24. When the commander of a fleet, or warship, issues a declaration of blockade, he must at once follow the procedure mentioned under the following headings:—

"1. Report the declaration of blockade to the Minister of Marine.

"2. Transmit the declaration of blockade to the Japanese Ministers resident in the foreign countries adjacent to the blockaded area, and request them to notify the Governments concerned and the various Ministers and Consuls resident in those countries of the fact that a blockade has been established.

"3. Communicate the declaration of blockade to all foreign Consuls resident in neutral territories adjacent to the blockaded area, and take all necessary steps to make the fact of the blockade generally known.

"4. Communicate, as far as is possible the declaration of blockade by means of a flag of truce to the proper authorities and to the Consuls of neutral Powers within the area of blockade."

Japanese Regulations, 1904.

Article 28 of the Japanese Regulations relating to Capture at Sea, 1904, provides for exemption from capture in the following instances:

"(3) When a ship which was within the blockaded area at the time of the establishment of the blockade leaves port without a cargo.

"(4) When a ship which had taken cargo on board within the blockaded area before the establishment of the blockade leaves port."

"65. The blockade declaration is issued either by the government of the blockading power or by the naval commander.

"It must contain:—

(a) the day of beginning of the blockade;

(b) the exact geographical limits of the blockaded coast;

(c) the period of time which will be allowed the neutral ships, and which must be at least sufficient, for them to leave port."

German Prize Rules, 1909.

"68. If, in the absence of a declaration of blockade made by the government itself, you are called upon to establish a blockade on your own initiative, you must first make a declaration stating:

(1) The date of the announcement of the blockade;

(2) The geographical limits of the blockaded coast line expressly given in latitude and longitude;

(3) The period within which neutral vessels may come out."

French Naval Regulations, 1912.

Article 9 of the declaration of London, 1909, substantially appears as Art. 90 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The English commander in establishing the blockade of Montevideo, allowed neutral vessels seven days in which to come out. The *Rolla* (1806) 6 C. Rob., 365.

"You will * * * establish and maintain the blockade of such of the enemy's ports as you may deem proper in the execution of your orders, giving to neutral vessels in such ports 20 days to leave. * * *"

Instructions, Dec. 24, 1846, from the United States Navy Department to the Commanding Officers of naval vessels in the Pacific. Vol. 55, British State Papers, p. 161.

The French notification of the blockade of the coast of Prussia in the Franco-Prussian war, provided "that friendly or neutral vessels will be allowed a delay of 10 days to complete their lading and to quit the blockaded ports."

British State Papers, vol. 60, p. 443.

"In accordance with the rule adopted by the United States in the existing war with Spain, neutral vessels found in port at the time of the establishment of a blockade will, unless otherwise ordered by the United States, be allowed thirty days from the establishment of the blockade to load their cargoes and depart from such port."

Instructions to United States Blockading Vessels, Navy Department General Orders, No. 492, June 20, 1898.

"In proclaiming on Dec. 20, 1902, a blockade of the ports of Puerto Cabello and Maracaibo, because of the rejection of certain demands by the Venezuelan Government, the German Government allowed days of grace, as follows: From ports in the West Indies or on the east coast of the American continent, 10 days for steamers and 20 days for sailing vessels; from all other points, 20 days for steamers and 40 days for sailing vessels, while ships lying in the blockaded ports were allowed 15 days. The British Government on the same day proclaimed a blockade of Laguayra, Carenero, Guanta, Cumana, Carupano, and the mouths of the Orinoco, with similar days of grace."

Moore's Digest, vol. 7, pp. 851.

The Italian notification of the blockade of Venezuelan ports, dated December 19, 1902, made "an allowance of the following days of grace:—

"1. For vessels sailing before the 20th December from West Indian ports and from ports on the east coast of the continent of America, ten days for steamers and twenty days for sailing-vessels;

"2. From all other ports, twenty days for steamers and forty days for sailing-vessels;

"3. For vessels lying in ports now declared to be blockaded, fifteen days.

"Vessels which attempt to violate the blockade will render themselves liable to all measures authorized by the law of nations and the respective Treaties between His Majesty the King of Italy and the different neutral Powers."

British State Papers, vol. 95. p. 427.

The German blockade of the Venezuelan ports, dated December 20, 1902, reads:

"The blockade takes effect on the 20th December, 1902.

"Ships other than those under the Venezuelan flag, which, on the before the date of this Notification from West Indian or East American ports, receive, in the case of sailing-ships, twenty days' grace, and, in the case of steamers, ten days.

"From all other ports sailing-ships receive forty days' grace, and steamers twenty days.

"Ships other than those under the Venezuelan flag, which on the day of this Notification, were lying in the blockaded ports, receive fifteen days' grace.

"Ships which attempt to break the blockade will be liable to such measures as are admissible in accordance with international law and the Treaties with neutral Powers."

"Berlin, December 20, 1902."

British State Papers, vol. 95, p. 426.

A blockade of the Venezuelan ports was proclaimed by the British government on December 20, 1902, "subject to an allowance of the following days of grace:—

"For vessels sailing before the date of this Notification from West Indian ports and from ports on the east coast of the continent of America, ten days for steamers and twenty days for sailing-vessels; from all other ports, twenty days for steamers and forty days for sailing-vessels; for vessels lying in ports now declared to be blockaded, fifteen days.

"Vessels which attempt to violate the blockade will render themselves liable to all measures authorized by the law of nations and the respective Treaties between His Majesty and the different neutral Powers."

British State Papers, vol. 95, p. 425.

The following excerpt from the instructions, dated May 12, 1849, from the American Secretary of State to the Minister to Denmark is quoted in Moore's Digest, vol. 7, p. 791:—

"It will be your duty, however, to bear in mind the true principles of blockade contended for and insisted upon by the United States. They are well known to the world. We deny that general and diplomatic notifications of blockade are of binding force; though they may be regarded as friendly notices. Blockade must be confined to par-

ticular and specified places, with a sufficient force near to intercept the entry of vessels, and no vessel is subject to capture without previous notice or due warning."

At the time of the blockade of the Southern ports during the Civil War, Mr. Seward, the American Secretary of State, advised the Prussian minister, "that merchant vessels in port at the time when the blockade took effect will be allowed a reasonable time for their departure." He likewise advised the Russian minister in particular respect to two Russian vessels at Savannah that "fifteen days have been specified as a limit for neutrals to leave the ports after actual blockade has commenced, with or without cargo."

Moore's Digest, vol. 7, pp. 849, 850.

"With regard to applications made in behalf of the citizens of foreign countries for permission to export from the Southern States property acquired before the proclamation of blockade, the following facts appear: May 10, 1861, the Austrian minister asked permission for an agent of his Government to purchase and ship tobacco for the Austrian Government monopoly; this request was declined on May 13. On March 3 and March 16, 1863, similar applications were made by the French minister in behalf of French firms who were purchasing tobacco to fill contracts with the Government monopoly of France; these applications were refused. On November 10, 1863, President Lincoln issued an executive order sanctioning the exportation, subject to certain conditions, of tobacco in the United States belonging to the Government of France, of Austria, or of any other state with which the United States was then at peace, such tobacco having been purchased and paid for by such government prior to March 4, 1861; and an informal convention was signed by the Secretary of State and the French minister, November 23, 1863, for regulating the mode of carrying out the executive order. On November 19, 1863, the Austrian minister was furnished with a copy of the order. In April, 1864, the French legation applied for an extension of the time prescribed in the convention, which was five months from the date thereof, so that the five months might run from the date of a second executive order of March 7, 1864. Mr. Seward, on April 19, expressed regret that controlling circumstances prevented an extenssion of time, but stated that the further execution of the convention might be regarded as suspended, only to be resumed when the reason for the suspension should cease. General Grant, in December, 1864, suggested serious objections from a military point of view, and the matter was postponed from time to time, and, although French vessels received clearance papers from the collector of customs at New York and proceeded to the James River, it does not appear from any records in the Department of State that they succeeded in getting out any of the tobacco before the blockade was raised. Mr. Fish, Sec. of State, to Mr. Johnston, U. S. Senate, Feb. 27, 1872, 92 MS. Dom. Let. 587.

"See also, Mr. Seward, Sec. of State, to Mr. Adams, min. to England, No. 799, Jan. 4, 1864, MS. Inst. Gr. Br. XIX. 122."

Moore's Digest, vol. 7, pp. 846, 847.

"Permission was also granted, on the request of the proper diplomatic representatives, for the British steamer *Myrtledene* and the Nor-

wegian steamer *Folsjo* to reenter the port of Cardenas, both vessels appearing to have left that port on notification of the institution of the blockade. In each case it was stated that the steamer was not only notified of the blockade, but was also ordered to go away. The allegation that the vessels were ordered away was afterwards denied in the case of at least one of them; but, without regard to this question, there seemed to be an obvious implication that when notice of the blockade was given they were not informed of the provision in the President's proclamation allowing to neutrals vessels lying in any of the blockaded ports thirty days' grace, and that, if they were not expressly ordered away, they at any rate construed the notice as an order to depart. The *Folsjo* had actually taken on board a part of her cargo, and in each case the cargo which was abandoned appeared to be the property of citizens of the United States. Under these circumstances instructions were given to allow the vessels in question to reenter the port and take on board, with all possible expedition, the cargoes of sugar which they had abandoned, it being understood that the permission was granted subject to the exigencies of any active military operations; that both vessels were strictly to observe the duties of neutrality, and particularly that neither of them was to carry more men or provisions than were necessary for the voyage.

"Subsequently, on the representation of the minister of Sweden and Norway that the *Folsjo*, after lying for some days at Key West, had proceeded to New York, and that in consequence of the delay she was required under a previous charter party to proceed to Europe, the Norwegian steamer *Uto* was allowed to take her place, with the additional condition that before proceeding to Cardenas she was to call at Key West and obtain from the commandant of the United States naval station a formal letter of permission. Mr. Day, Sec. of State, to Mr. Grip, May 11, 1898, MS. Notes to Swedish Leg. VIII. 88; Mr. Moore, Assist. Sec. of State, to Sec. of Navy, May 11, 1898, 228 MS. Dom. Let. 404."

Moore's Digest, vol. 7, p. 848.

"The first hostile act of the United States, on the outbreak of the war with Spain in 1898, was the blockade, under a proclamation of the President of April 22, 1898, of the ports of the north coast of Cuba from Cardenas to Bahia Honda, inclusive, and of the port of Cienfuegos on the south coast. On June 27, a governmental blockade was proclaimed of all ports on the south coast of the island from Cape Frances to Cape Cruz, inclusive, and of the port of San Juan, Porto Rico. Various blockades de facto were also maintained. The object of a blockade being to cut off all intercourse between the inhabitants of the blockaded place and the world outside, it is a general rule that while a period is allowed—usually of fifteen days—during which vessels may depart either in ballast or with cargo bought and shipped before the commencement of the blockade, no cargo is permitted to be shipped after the blockade is instituted. In the first proclamation of blockade by the United States, which was issued April 22, a period of thirty days was allowed for the departure of neutral vessels from the blockaded ports, but nothing was said as to the cargo. The natural inference would therefore have been that no cargo could be taken on board after the blockade was instituted. But in applying the proclamation to the cases that arose under it, the United States con-

strued it as permitting the taking of cargo during the thirty days, and when the next proclamation was issued, the point was expressly covered by a clause in which it was stated that neutral vessels lying in any of the ports to which the blockade was then extended would be allowed 'thirty days to issue therefrom with cargo.' The same rules were applied in the case of the de facto blockades established by Admiral Dewey in the Philippines. These and other features of the law of blockade were included in General Orders, No. 492, entitled 'Instructions to blockading vessels and cruisers,' which were issued by the Navy Department, with the cooperation of the Department of State, on June 20, 1898, for the information and guidance of the naval service."

Moore's Digest, vol. 7, pp. 850, 851.

In the *Vrou Judith* (1799) (1 C. Rob. 150), Sir William Scott said that the utmost that can be allowed a neutral vessel in a blockaded port "is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered a rule which this court means to apply, that a neutral ship departing, can only take away a cargo *bona fide*, purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade."

In the case of the *Rolla* (1807) (6 C. Rob. 364), the court considered the question of the power of the commander of a fleet to establish a blockade and also the question of the legality of such a blockade that was established without orders from the government.

In regard to the first question, Sir William Scott said:—"On the former hearing it was contended that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander, without special authority. But the court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service on which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant parts of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the more immediate purpose of reduction."

In regard to the second question, the learned judge said that "however irregularly" the commander "may have acted towards his own government the subsequent conduct of the government in adopting that enterprise, by directing a further extension of that conquest, will have the effect of legitimatizing the acts done by him, so far at least as the subjects of other countries are concerned. The government has not disclaimed the acquisitions as obtained wrongfully; on the contrary they have recognized his acts by seizing Maldonado, and by retaining the footing which had been acquired for them in that country, thereby expressing their recognition of the seizure, as a seizure made

by the forces of this country validly applied. I am therefore of opinion, that the blockade is not to be impeached on the ground of want of regular authority."

In the case of the *Gerasimo* (1857) (11 Moore P. C. 88, Scott. 811, 816), it was said that, "by the rules of law, when a ship has entered a blockaded port before the blockade, she is entitled to come out again; and if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out."

The *Hiawatha* (1861) (Blatch. 19):

The Court said: "The act of egress is as culpable as the act of ingress, when done in fraud of the blockade. (The *Frederick Molke*, 1 Ch. Rob., 86; the *Vrouw Judith*, Id., 151; The *Neptunus*, Id., 171.) Chancellor Kent approves the doctrine of Sir William Scott in these cases, and confirms the reason of it, because, he says, the object of the blockade is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. (1 Kent's Comm., 146.) On notice that the port of Richmond was under blockade, the *Hiawatha*, being a neutral vessel, had a right to withdraw, with all the cargo then honestly laden on board, but she could not have a right to add to her cargo after notification or knowledge of the blockade. The British authorities are strict to this point, and the American decisions accord with them, that the privilege of the neutral vessel to leave a port blockaded after her entry is limited to the vessel itself, and her cargo *bona fide* purchased and laden on board before the commencement of the blockade. (1 Kent's Comm., 146; The *Comet*, Edwards, 32; Olivia *v.* The Union Ins. Co., 3 Wheat., 194.)"

The Prize Cases (1862) (2 Black. 635). The facts were as follows: On the establishment of the blockade of the Southern coast at the beginning of the Civil War, it was announced that fifteen days after the blockade became effectual as to any part of the coast would be allowed for neutral vessels to leave port. The blockade of the James river was effectual on April 30, 1861. The fifteen day period expired on May 15. At the time of the establishment of this blockade the neutral-owned *Hiawatha* was at Richmond loading cargo. She did not sail until May 18, claiming that she had been unable to get a tug sooner. She was captured in Hampton Roads on May 20.

The Supreme Court held her a good prize saying: "The proclamation allowed fifteen days—not fifteen days, *and until a steam-tug could be procured*. The difficulty of procuring a tug was one of the accidents which must have been foreseen and should have been provided for. Those concerned, notwithstanding the warnings they received, in their eagerness to realize the profits of a full cargo, took the hazards of the adventure and must now bear the consequences. If she could overstay the time limited for a short period she could for a long one. Whatever the excess of time, the principle involved is the same."

In the case of the *Adula* (1900) (176 U. S. 361, Scott, 826), the Supreme Court of the United States considered the question of the legality of a blockade established by a naval officer of Guantanamo Bay. The Court said: "No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba be-

tween Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the *Adula*. * * *

"A *de facto* blockade was also recognized as legal by this court in the case of The *Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the chief justice observed: 'There is a dstinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation.' A like ruling was made by Sir William Scott in the case of The *Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of The *Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But says the learned judge: 'The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction.' See also The *Johanna Maria*, Deane on Blockades, 86.

"In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy as they would be quite sure to do if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleagured port, would be

immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington. * * *

"Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in The *Vrouw Judith*, 1 C. Rob. 126, 128, 'as a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo *bona fide* purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade.' It is also said by Phillimore, 3 Int. Law, 383, that 'the object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place.'"

BLOCKADE DECLARATION VOID AND NEW DECLARATION NECESSARY, UNLESS BLOCKADE OPERATIONS TALLY WITH STATEMENTS OF DECLARATION.

If the operations of the blockading power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.—*Article 10, Declaration of London, 1909.*

"The object of this article is to insure the observance of article 9. Supposing the declaration of blockade contains statements which do not tally with the actual facts; it states that the blockade began, or will begin, on such a day, whereas, in fact, it only began several days later. Its geographical limits are inaccurately given; they are wider than those within which the blockading forces are operating. What shall be the sanction? The nullity of the declaration of blockade, which prevents it from being operative. If then, in such a case, a neutral vessel is captured for breach of blockade, she can refer to the nullity of the declaration of blockade as a plea for the nullity of the capture; if her plea is rejected by the national tribunal, she can appeal to the international court.

"To avoid misunderstandings, the significance of this provision must be noticed. The declaration states that the blockade begins on the 1st of February; it really only begins on the 8th. It is needless to say that the declaration had no effect from the 1st to the 8th, because at that time there was no blockade at all; the declaration states a fact, but does not take the place of one. The rule goes further: The declaration shall not even be operative from the 8th onward; it is definitely void, and another must be made.

"There is no question here of cases where article 9 is disregarded by neglect to allow neutral vessels in the blockaded port time to leave it. The sanction could not be the same. There is no reason to annul the declaration as regards neutral vessels wishing to enter the blockaded port. A special sanction is needed in that case, and it is provided by article 16, paragraph 2."

General report of drafting committee to London Naval Conference.

"The notice of a blockade must not be more extensive than the blockade itself."

Kent, vol. 1, p. 153, note.

"Where an enemy's port was declared in a state of blockade by notification, and at the same time when the notification was issued news arrived that the blockading squadron had been driven off by a superior force of the enemy, the blockade was held by the Prize

Court [1] to be null and defective from the beginning, in the main circumstance that is essentially necessary to give it legal operation; and that it would be unjust to hold neutral vessels to the observance of a notification, accompanied by a circumstance that defeated its effect. This case was, therefore, considered as independent of the presumption arising from notification in other instances; the notification being defeated, it must have been shown that the actual blockade was again resumed, and the vessel would have been entitled to a warning, if any such blockade had existed when she arrived off the port. The mere act of sailing for the port, under the dubious state of the actual blockade at the time, was deemed insufficient to fix upon the vessel the penalty for breaking the blockade."

Wheaton, p. 679.

Dana says that it was held in the *Franciska* (10 Moore's P. C. 59) that: "If an official notification is relied upon, it must not be larger than the fact. A notice that several neighboring ports are under blockade, when, in fact, some of them are not, is an invalid notice. It does not give the neutral the choice of ports, which a notice according to the facts should have given him; and such notice is not good as to ports actually blockaded, and will not affect the neutral with the knowledge as to those ports."

Wheaton, Dana's Note, 235, p. 682.

"Accuracy and precision in declarations of blockade are of immense importance. Neutrals have every right to know the exact extent of their liabilities. It is, therefore, provided that if the particulars as to the date of commencement and geographical limits do not tally with the facts of the blockade, the declaration is null and void. Consequently the blockade is inoperative, and a new and accurate declaration is necessary. Meanwhile captures made for breach of blockade are illegal, and the vessels must be released."

Lawrence, pp. 687, 688.

"The notification or announcement of a blockade, whether by a government or by a commander on the spot, must not embrace a larger extent of coast than is really blockaded, since otherwise, by its deterrent effect on the sailings of neutrals, it would gain some of the advantage of blockade where the reality which is the only justification of that advantage was wanting. Such an excess in the notification would vitiate the blockade even of those parts of the coast on which it was really established. In the American civil war President Lincoln's proclamation notified the intention to blockade the whole Confederate coast, and the actual blockade was announced by the different commanders as different parts of that coast were considered by them to be really blockaded. Each neutral vessel attempting ingress was therefore entitled to receive and received a warning, as in the case of a blockade by a commander which no government notification had introduced; only this ceased when the blockade had become notorious at the ports from which the blockade-runners sailed, as though the fact and its notoriety related to the proclamation. Some of the announcements by the commanders were more extensive than

[1] The *Triheten* (1805), 6 C. Rob., 65.

they had forces to support, and the mixed commission under the treaty of Washington awarded damages to the *Monmouth* for being warned off the whole coast."

Westlake, vol. 2, p. 270.

"ART. 121. Any notification which declares under blockade a larger extent of coast than is actually blockaded,[1] or that a blockade is *about* to be instituted, is null and void."

Naval Prize Law, Holland.

"66. When the blockade was begun later, or has less wide extent than is stated in the blockade declaration, the declaration is void and therewith the whole blockade legally not binding. In such case the issue of a new declaration is necessary, in order to make the blockade legally effective at least for the future.

"If the blockade began earlier or extended wider than stated in the blockade declaration, the blockade is legally binding only from the time and for the coastal extent which were indicated in the blockade declaration."

German Prize Rules, 1909.

Article 10 of declaration of London, 1909, substantially appears as Art. 91 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the case of the *Henrick and Maria* (1799) (1 C. Rob. 146), a Danish vessel was captured for breach of blockade while on a voyage from Norway to Amsterdam. On being stopped the following notice was written on the ships papers: "This ship was boarded and warned not to proceed to any Dutch port." The master testified "that the ship was arrested, because he said he must proceed according to the bill of lading."

Sir William Scott said: "The notice is, I think, in point of authority, illegal. At the time when it was given, there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty, and a commander of a king's ship is not to extend it.

"The notice is, also, I think, as illegal in effect as in authority. It cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election, as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress. And I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation.

"But that he did so, rests only on verbal answers and conversation. I adhere to what I said before, that an obstinate adherence to a first intention would subject a ship to the penalty, and the owners must bear the consequences of the obstinacy of their master. But I think the conversation of this man was not an expression of final intention; but that of a man deliberating under difficulties, in which he was unfairly placed. The captain of the king's ship asked the master,

[1] *Henrick and Maria*, 1 C Rob., 146. *Franciska*, Spinks, 299.

if he knew that Holland was blockaded, and he answered 'that he did not.' This question agrees with the written notice, and shows how strange a misapprehension the commander had entertained, of the nature of the blockade which he was employed to form.

"The master said, 'he could not answer it to his owners to go to any place but Holland.' The commander does not point out to him any ports of Holland to which he might go, but tells him he might go to Bremen, Hamburgh, or England, and adds, 'as you must go to Holland, you are my prize.' I think the notice was erroneous and besides not broken; and, therefore, I restore this ship."

In the *Franciska* (1855) (10 Moore P. C. 37, Scott 804), it was said that "the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

"This was distinctly laid down by Lord Stowell in the case of The *Henrick and Maria*, 1 Rob. 148, where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: 'The notice is, I think, in point of authority, illegal; at the time when it was given there was no blockade which extended to all the Dutch ports. A declaration of blockade is a high act of sovereignty; and a commander of a King's ship is not to extend it. The notice is, also, I think, as illegal in effect as in authority; it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation.'

"The authority of this case is fully recognized by Dr. Lushington in the present case, who observes that such an administration of law in protecting the party misled, was most just."

A declaration of blockade is notified—

(1) To neutral powers, by the blockading power by means of a communication addressed to the Governments direct, or to their representatives accredited to it.

(2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coast line under blockade as soon as possible.—*Article 11, Declaration of London, 1909.*

"A declaration of blockade is not valid unless notified. The observance of a rule can only be required by those who have the opportunity of knowing it.

"Two notifications must be made:

"1. The first is addressed to neutral powers by the belligerant power, which communicates it to the governments themselves or to their representatives accredited to it. The communication to the governments will in most cases be made through the diplomatic agents; it might happen that a belligerent had no diplomatic relations with a neutral country; he will then address itself, ordinarily by telegraph, directly to the government of that country. It is the duty of the neutral governments advised of the declaration of blockade to take the necessary measures to dispatch the news to the different parts of their territory, especially their ports.

"2. The second notification is made by the commander of the blockading force to the local authorities. These must inform, as soon as possible, the foreign consuls residing at the blockaded place or on the blockaded coast line. These authorities would be responsible for the neglect of this obligation. Neutrals might suffer loss from the fact of not having been informed of the blockade in sufficient time."

General report of drafting committee to London Naval Conference.

"Section 37. The officer in charge of the blockade should also transmit a notice of the declaration of blockade to the authorities and consuls of the blockaded place. The same formalities shall be observed when a blockade which has ceased to be effective has been re-established and when a blockade is extended to new points."

Institute (1882), p. 52.

A notice of blockade "to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is a duty of the neutral government to communicate the notice to their people."

Kent, vol. 1, p. 153.

"It has been held by the English courts of admiralty, that the notification of a blockade to a neutral government, is, by construc-

tion of law, a direct personal notice to each inhabitant of that country, and that he cannot be allowed to aver his own ignorance of the blockade, or otherwise contradict the legal presumption of knowledge. To allow individuals to plead ignorance of a blockade which had been notified to their government, would wholly defeat the object of the notification. It is true, that the exclusion of this evidence may operate with severity in particular cases; but an opposite construction would render a notification, in the words of Sir William Scott[1] 'the most nugatory thing in the world.' If the neutral government should fail to communicate the information to its subjects, by a prompt and authoritative publication of the notice which it receives, those subjects who suffer from such neglect cannot complain of the belligerent state, but must address their complaints, and demand for compensation, to their own government."

* * * * * * *

"A public notification to one neutral state, will be presumed, in due time, to reach the inhabitants of a neighboring power not officially notified of the blockade, as such information, generally circulated in one country, must of necessity in time reach the knowledge of the inhabitants of an adjoining country. But as such notification does not, *proprio vigore*, bind the inhabitants of any state but that to which it is addressed, the presumption of such knowledge, in a reasonable time, may be repelled by positive evidence. So, where a blockade has lasted for such a considerable time as to render it highly probable that its existence must have been known at the port of departure, a knowledge of it will be presumed, and it will rest upon the party to show by satisfactory proof, that he was not apprized of the blockade."

Halleck, pp. 548, 551.

"*Notification of Blockade.*—The proclamation of the blockade in the American civil war, by the President, April 19, 1861, had a clause that gave rise to doubt and difficulty. It says, 'I have deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and the laws of nations in such cases provided. For this purpose, a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning; and, if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured,' &c. This last sentence is omitted in the proclamation of 27th April, extending the blockade to the ports of Virginia and North Carolina.

"In answer to inquiries by Lord Lyons, Mr. Seward said that 'the proclamation is mere notice of an intention to carry it into effect, and the existence of the blockade will be made known in proper form by th blockading vessels.' (Lord Lyons to Lord Russell, May 4, 1861.) In answer to a further inquiry, whether it was the intention of the government to issue notice for each port as soon as the actual blockade of it should commence, Mr. Seward said, as reported by Lord

[1] The *Neptunus*, 2 C. Rob., 110.

Lyons to Earl Russell, 'that the practice of the United States was not to issue such notices, but to notify the blockade individually to each vessel approaching the blockaded ports, and to inscribe a memorandum of the notice having been given, on the ship's papers. No vessel was liable to seizure which had not been individually warned. The fact of there being blockading ships present to give the warning, was the best notice and best proof that the port was actually and effectually blockaded.' And, in Mr. Seward's letter to Mr. Adams of June 8, 1861, he says, 'The President's proclamation was a notice of the intention to blockade; and it was provided that ample warning should be given to vessels approaching and vessels seeking to leave the blockaded ports, before capture should be allowed. The blockade, from the time it takes effect, is everywhere rendered actual and effective.'

"On the 30th April, Commodore Pendergrast, in command of the squadron of the coasts of Virginia and North Carolina, issued a proclamation announcing the actual commencement of the blockade, in which he limits the warning to vessels which should approach the line of blockade *in ignorance of its existence*. This construction of the proclamation was never disavowed by the government.

"When the prize causes came up in the District Courts, it was contended for the claimants, that, under the proclamation, every vessel, whether in fact knowing of the blockade or not, was entitled to receive one notice and warning on the spot from the blockading vessels, and that none but second comers could be condemned. But the prize courts, without exception, denied this position. They held that, by the law of nations, if a vessel was captured off the blockaded port, with a destination into that port, and is shown, either by testimony or the force of settled presumptions, to have had knowledge that a blockade of that port had been instituted, she was subject to condemnation, and would not be permitted to show that her purpose was to satisfy herself on the spot that the blockade existed, or that it was effective. If the vessel honestly desires such information, she must get it elsewhere and otherwise. And they held that the proclamation was not intended to waive the rights of belligerents in that particular. The proclamation, it is true, was only notice of an intent to blockade an entire coast; and a further knowledge of an actual blockade of the port or section in question must be brought home to the vessel captured. In the absence of special official proclamations as to each port, the knowledge could be brought home to the vessel either by proof of the previous warning named in the first proclamation, or by the direct proofs or presumptions allowed by the law of nations in such cases, as notoriety at the port of departure, and other modes, aided by the general knowledge of the intent as conveyed by the proclamation. (The *Revere*, Sprague's Decisions, ii and Law Reporter, xxiv. 276. Also, in the district of New York, before Judge Betts, the cases of The *Delta*, *Hiawatha*, *Crenshaw*, *Hallie Jackson*, *Edward Bernard*, *Louisa Agnes*, *Cheshire*, and *Empress;* and, in the Pennsylvania district, before Judge Grier, The *Admiral*. See Upton's Prize Law, 291–5.) This interpretation of the proclamation was sustained in the Supreme Court on appeal. (The Prize Causes, Black. ii. 635.) Judge Grier, in delivering the opinion of the court, says, 'If the provision referred to in the proclamation of 19th April be applicable

to the ports of Virginia, it must be considered in the light of surrounding circumstances.' Referring to the proclamation of Commodore Pendergrast, as not disavowed by the government, he adds that the warning provided 'was intended for the benefit of the innocent, not of the guilty. It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times; and, when caught, her captors could do nothing but warn her, and indorse the warning upon her register. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the praclamation, the *Alabama* might approach, and, if captured, insist upon the warning and indorsement on her registry, and then demand her discharge. A construction drawing after it consequences so absurd, is a *felo de se*.'

"After these decisions, the practice became settled, and no complaint was made by neutral powers against this construction of the proclamation: and, under it, the law respecting notice of blockades was applied as heretofore in the English and American courts. (*Spes and Irene*, Rob. v. 77–81. *Betsey*, Ib. i. 334. *Arthur*, Edwards, 203. *Columbia*, Rob. i. 154–6. *Apollo*, Ib. v. 286–9. *Mercurius*, Ib. v. 82. *Rolla*, Ib. vi. 364. *Franciska*, Moore's Privy Council Cases, x. 58. *Panaghia Rhomba*, Moore's Privy Council Cases, xii. 168.)"

Wheaton, p. 680, Dana's Note 235.

"Justice to neutrals requires that their ships should not be subject to the risk and delays of a voyage to a port, where they may be debarred admission. The universal practice, is, therefore, to communicate the news of a blockade to neutral governments, upon whom lies the responsibility of making it known to those who are engaged in commerce. * * *"

There has been a difference of opinion among European authorities as to the necessity of warning neutral vessels off a blockaded port in addition to the general formal warning of the blockade to the neutral governments. "The English authorities make two kinds of blockade, one a blockade *de facto*, which begins and ends with the fact, and which will involve no vessel attempting to enter a harbor in guilt, unless previously warned off; and the other a blockade, by notification, accompanied by the fact. In the latter case, the presumption is that the blockade continues until notice to the contrary is given by the blockading government. Hence ignorance of the existence of the blockade cannot ordinarily be plead as an excuse for visiting the blockaded port, but the voyage itself is evidence of an intention to do an unlawful act. This seems to be quite reasonable: notice to the neutral state must be regarded as notice to all shippers who are its subjects, and if the rule of evidence presses hard in a few cases, the blockading government is not in fault. But the notice must be given to all neutral powers in order to reach their subjects: general notoriety, as by news traveling from one country to another, is not sufficient notice.

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"All the modern French writers on the rights of neutrals upon the sea, except Hautefeuille, hold that the two kinds of notice, that

from the government and that from the blockading squadron, are necessary. (Ortolan, ii., 305 *et seq.*, ed. 2; Cauchy, ii., 421; Pistoye et Duverdy, i., 372.) Hautefeuille regards the special notification as essential in all cases, but does not hold the diplomatic notification to be necessary. (ii., 226, ed. 2.) The French government carries out the same views. In 1838, when the Mexican blockade was in progress, Count Molé, then Minister of Foreign Affairs, wrote to his colleague, the Minister of Marine, in regard to the conduct of the commander of the fleet in the Mexican seas, as follows: 'M. N. confounds here two things very distinct, the diplomatic notification which ought to be made of the blockade to the neutral powers, and the information which the commanders of the forces, employed to maintain it, are always bound to give to such ships as present themselves at the blockaded places. He seems to think that going through with the first formality dispenses necessarily with the second, which would thereafter become superfluous. Such a manner of proceeding is contrary not only to the ordinary principles of maritime law, but also to instructions emanating from your department, and to the communications which were made to the Government of the United States and to the foreign consuls at Vera Cruz at the time [of commencing the blockade]. I will not recall here the reasons why, independently of the official and diplomatic notice of a blockade, every ship showing itself before the blockaded port ought to receive from the commander of the blockading squadron the warning,' etc.

"In all the treaties of commerce made between France and the South American republics a clause is inserted to the effect that no vessel of commerce belonging to citizens of either of the treaty-making powers shall be seized, captured, or condemned, without having received a previous notice of the existence or continuation of the blockade from the blockading forces or from some vessel forming a part of the blockading division or squadron; and particular rules follow in regard to the visé of the commander giving the notice, which is to be put upon the ship's register, and for which the captain of the vessel overhauled and visited shall give a receipt. (Ortolan, u. s.)

"The same rule has been followed by Denmark, and generally by the governments of continental Europe. It appears in a large number of treaties. The armed neutrality of 1800 proclaimed it as one of their principles of commercial liberty, that no vessel can be regarded as having broken blockade until, after being informed by an officer of the blockading vessel concerning the condition of the port, it attempted to enter by fraud or strategem. (Martens, "Rec.," vii, 176.) The weight of opinion, also on the continent is upon the same side. (Comp. Gessner, u. s., 179–192.)

"In Jay's treaty with England (1794), and in a number of treaties with the South American States, the United States have adopted the provisions given in the text. But the words 'so circumstanced' seem to show that the provision applies only to cases where there is ignorance of the blockade of a particular port. It cannot therefore be cited as agreeing with French practice, for which purpose Ortolan (ii., 308) and Gessner (p. 204) use it. Nor did Mr. Lincoln, perhaps, mean anything else in his proclamation of blockade, where he says, in quite general terms, which would seem to announce a rule

not confined to the beginning of the war, that a vessel approaching or attempting to leave any of the blockaded ports 'will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning,' after which, on trying to do the forbidden act, she will be captured, and sent into some port for adjudication. At least the government did not adhere to the rule through the war, and as early as in July, 1861, a vessel ignorant of the war was captured before attempting to enter a port. In fact, the doctrine of continuous voyages could hardly have been applied, if such warning had been thought necessary.

"The continental doctrine is compelled to break down in regard to those blockades in distant parts of the world, which a commander of a squadron, as the representative of his government, is allowed to impose. They can occur before any diplomatic notification, and a vessel thus warned is still a lawful prize.

"This doctrine appears to the writer to be destitute of a rational foundation. Why should two notifications be judged necessary? One can see the need of a 'diplomatic' notification. It saves the neutral merchant from the risk and loss of an adventure which the war will prevent him from carrying out according to his intentions. And the notification at the port is necessary as a supplemental warning, when there has not been time for the ships of neutrals on the sea or in distant ports to become aware of the existence of a blockade. But apart from this exceptional case, and from the case that the blockade has been raised, to give notice to a vessel coming to a port to break a blockade is like giving notice to a burglar trying to break into a house. It is a highly criminal proceeding to try to break a blockade. It is becoming a party to a war. A person trying to steal into an invested town with provisions would be summarily dealt with. Why this great compassion for neutrals engaged in a wrong traffic? Especially does such trade require to be the more severely treated, as long as neutral nations themselves throw the gates open, and make no movement to hinder this kind of commerce. For our part, while we could wish to have all private ships and goods engaged in innocent trade exempt from seizure, we would wish to have illicit trade subject to the heavier penalties, even to the punishment of the crew, to have the ship liable in cases of ordinary contraband, and to have neutral states stop such adventures within their own ports."

Woolsey, 345–350.

"It is necessary that the existence of the blockade should be known to those who are accused of breaking it. Such knowledge is actual or presumptive. It is actual when it can be brought home by clear proof to the shipmaster concerned. It is presumptive when the surrounding circumstances are proved to be such that it would have been impossible, or barely possible, for him to remain ignorant. France and the group of powers which adopted her views used to hold that before a vessel could be condemned for breach of blockade information must be given to her directly by an officer of one of the warships of the blockading force. That is to say, they insisted on actual knowledge of the most direct kind in every case. On the other

hand Great Britain and her following maintained that knowledge must be assumed when a blockade had been diplomatically notified, or when it had become notorious, though they allowed the ship-master to prove his ignorance if he could. Only in cases when it was clear he could not know did they give him the benefit of an individual warning endorsed on his ship's papers. In the Declaration of London the French school gave up their doctrine of the necessity of individual warning in every case, a concession which must be set against the surrender by the British school of their claim to effect a capture at any point in the outward or return voyage. The rules finally agreed on are just and reasonable, and will afford security to all who are *bona fide* ignorant, without impairing the efficiency of blockade.

Lawrence, pp. 690, 691.

"Although Continental writers have always held notification to be essential for the establishment of blockade, they differed with regard to the kind of notification that is necessary. Some writers maintained that three different notifications must take place—namely, first, a local notification to the authorities of the blockaded ports or coast; secondly, a diplomatic or general notification to all maritime neutral States by the blockading belligerent; and, thirdly, a special notification to every approaching neutral vessel. Other writers considered only diplomatic and special notification essential. Others again maintained that special notification to every approaching neutral vessel is alone required, although they recommended diplomatic notification as a matter of courtesy.

"As regards the practice of States, it has always been usual for the commander who established a blockade to send a notification of the blockade to the authorities of the blockaded ports or coast and the foreign consuls there. It has, further, always been usual for the blockading Government to notify the fact diplomatically to all neutral maritime States. And some States, as France and Italy, have always ordered their blockading men-of-war to board every approaching neutral vessel and notify her of the establishment of the blockade. But Great Britain, the United States of America, and Japan did not formerly consider notification to be essential for the institution of a blockade. They held the simple fact that the approach was blocked, and egress and ingress of neutral vessels actually prevented, to be sufficient to make the existence of a blockade known, and when no diplomatic notification had taken place, they did not seize a vessel for breach of blockade whose master had no actual notice of the existence of the blockade. English, American, and Japanese practice, accordingly, made a distinction between a so-called *de facto* blockade on the one hand, and, on the other, a notified blockade.

Oppenheim, vol. 2, pp. 457, 458.

"ART. 119. The Commander of the Squadron, after instituting a Blockade *de facto*, should therefore take proper steps in order that a valid Notification of the Blockade may be duly made to foreign States."

Naval Prize Law, Holland.

"Art. 120. Notification of a Blockade to a foreign State is an official announcement of the institution of the Blockade made to that foreign State, either by the British Home Authorities or by the Resident British Minister."

Naval Prize Law, Holland

"Art. 124. He [Commander of Blockading squadron] should also send copies [of declaration of blockade.] to British Ministers resident in foreign States neighbouring to the scene of the Blockade, together with a letter desiring Notification to be made. * * *"

"Art. 125. In addition, the Commander of the Squadron should communicate his Declaration to the Consuls of all the States, Neutral as well as Belligerent, residing at any Neutral Port near to the Blockade, and also (if it can be conveniently done), under a flag of truce, to the Authorities of the Blockaded Ports; and generally he should use all means in his power to make the fact of the Blockade everywhere known."

Naval Prize Law, Holland.

"Art. 39. The notification of a blockade must be made before neutral vessels can be seized for its violation. This notification may be general, by proclamation, and communicated to the neutral States through diplomatic channels; or it may be local and announced to the authorities of the blockaded port and the neutral consular officials thereof. A special notification may be made to individual vessels, which is duly indorsed upon their papers as a warning. A notification to a neutral State is a sufficient notice to the citizens or subjects of such State. If it be established that a neutral vessel has knowledge or notification of the blockade from any source, she is subject to seizure upon a violation or attempted violation of the blockade."

United States Naval Code, 1900.

"67. The blockade declaration is to be made known:—

(a) to neutral powers by the government of the blockading power through diplomatic channels. The neutral powers have to provide for making the blockade known within their borders, especially in their ports;

(b) to the local competent authorities through the commander of the blockading force. These must on their parts as soon as possible communicate the declaration to the foreign consuls of the blockaded ports or coasts for the information of the citizens of the neutral countries and the ships there.

"The communication can be made in any way, so far as it is made certain it reaches the hands of the local competent authorities. It is sufficient in any case to inform the port authorities."

"68. If on account of the omission of the commander of the blockading force the information has not been given to the port authorities, a neutral ship has the right of free passage out of a blockaded port, unless it has, with previous knowledge of the blockade, broken it by entering.

"The naval commander may make up for the notification in question at any time."

"69. To make the blockade legally binding according to 59, the notification under 67. (a), suffices for ingoing ships; as long as this has not been done, the blockade declaration must be especially communicated to each ingoing ship, according to 74. For outgoing ships, the notification of 67 (b) is sufficient (see 75)."

"75. If the enemy has made it impossible for the commander of the blockading force to communicate the declaration to the competent local authorities, every neutral ship leaving a blockaded port is entitled to the special notification provided for under 74.

"If such is once given and the ship returns to the blockading port, then all other vessels leaving this port will be assumed to have knowledge of the blockade."

German Prize Rules, 1909.

"69. In all cases the establishment of a blockade must likewise be made the subject of a formal notification to the authorities of the blockaded points. This notification, for which you will find a model in Annex III, shall be sent to those authorities, and at the same time to the consul of one of the neutral Powers, by means of a parlementaire."

"70. When the case arises, you will acquaint me, by the speediest way, with every step taken on your own initiative for the establishment of a blockade, in order to permit me to complete in the shortest time your notification to the local authorities by a notification to the neutral Powers through the diplomaic channel."

French Naval Regulations, 1912.

Article 11 of the Declaration of London, 1909, substantially appears as Art. 92 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"Notification of blockade must be made directly to the governments of neutral powers. Mr. Rush, Sec. of State, to Mr. Correa, Portuguese min., May 28, 1817, MS. Notes to For. Legs. II. 229."

Moore's Digest, vol. 7, p. 823.

"Notice may be express, to a particular government, or to a ship, or it may be inferred from all the facts, among which notoriety is to be especially considered. To proceed to the mouth of the blockaded port on the plea of there seeking information, exposes the vessel to serious suspicion of knowledge of blockade, and the mere hovering around a blockaded port, as if to seize some unguarded point to enter, is ground for seizure. See The *Cornelius*, 3 Wall. 214."

Moore's Digest, vol. 7, p. 821.

In a despatch dated May 2, 1861, to Lord Russell, Lord Lyons outlines a conversation he had with the American Secretary of State, Mr. Seward, in regard to the blockade of the Southern ports. In response to an inquiry as to whether it was proposed to issue formal notices whenever a port was blockaded, Mr. Seward replied, "that the practice of the United States was not to issue such notices, but to notify the blockade individually to each vessel approaching the blockaded port, and to inscribe a memorandum of the notice having been given on the ships papers. No vessel was liable to seizure which had not been individually warned. This plan had, I was assured, been

found to be in practice the most convenient and the fairest to all parties. The fact of there being blockading ships present to give the warning was the best notice and best proof that the port was actually and effectually blockaded."

British State Papers, vol. 55, p. 659.

In the case of The *Adelaide Rose* (1799) (2 C. Rob. 11, note), a Bremen ship captured for breach of the blockade of Amsterdam, it was contended that she should be released for the reason that the blockade had never been notified to the Hanse Towns. The vessel had entered Amsterdam in ignorance of the blockade and was captured on her way out.

The court said that while subjects of a state not notified of blockade are not affected by it as soon as subjects of a state that is notified, "that it does not affect them at any time is going too far: because, if a notification is made to the principal states of Europe, I think a time would come when it would affect the rest; not so much *proprio vigore*, or by virtue of the direct act, as in the way of evidence. It is the duty of a state to make the notification as general as possible. But I must think, that a time would come when a notification to neighboring powers would affect those to whom it was not directly made. From the moment that a notification is made to a government, it binds the subjects of that state: because it is supposed to circulate through the whole country. But suppose a notification is made to Sweden and Denmark, it would become the general topic of conversation: and it would be scarcely possible that it should not have travelled to the ears of a Bremen man: and although it might not be so early known to him as to the subjects of the states to which it was immediately addressed, yet, in process of time, it must reach him; and must be considered to impose the same observance of it on him. It would strongly affect him with the knowledge of the fact, that the blockade was *de facto* existing. Therefore, on these grounds, I should hold that although a notification does not *proprio vigore* bind any country but that to which it is addressed, yet, in a reasonable time, it must affect neighboring states with knowledge, as a reasonable ground of evidence."

In the case of the *Neptunus* (1799) (2 C. Rob. 110, Scott, 796), Sir William Scott said that "the effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent."

In the case of the *Weelvaart Van Pillaw* (1799) (2 C. Rob. 128), a Prussian vessel was captured for breach of blockade outward of the port of Amsterdam. This blockade had been notified to the neutral powers. Sir William Scott said "that it was the duty of the Prussian government, having received the public notification many months before, to have communicated it to their subjects in different

ports." A Prussian ship would not accordingly be heard to plead ignorance.

In the case of *The Spes* and *The Irene* (1804) (5 C. Ro b.77),two vessels captured for breach of the blockade of the Elbe, it was said that no notice of blockade "had been received from the consul of the state of Hamburg; though I must presume it had, because, as the notification was made to the consul here, it was his duty to make the communication to the consuls of his government in foreign ports. And as the information had arrived at Hamburg, and had been actually communicated from thence to Archangel, by private channels, the same communication must be supposed to have been made from public authority to the public minister; or, if not, if there had been any neglect, the consequence must be imputed only to the state, and its officers, who are answerable to their subjects for the consequence of their neglect. It is said indeed, that the masters received contrary information from their consul, and that they were told by him that the blockade was raised: though the averment does not, I perceive, distinctly state that, as appears by the evidence in this very case, but only that it would be raised before they arrived. Had the information been more positive, it would be difficult to attribute to it any such effect as would serve to the indemnification of these parties. If this conjectural information at Archangel proves false, they must look for redress to their own government, or to those employed under it, who gave such erroneous intelligence. If the information of foreign ministers could be deemed sufficient to exempt a party from all penalty, there would be no end of such excuses. Courts of justice are compelled, I think, to hold as a principle of necessary caution, that the misinformation of a foreign minister cannot be received, as a justification for sailing in actual breach of an existing blockade."

In the *Rolla* (1807) (6 C. Rob. 365) it was contended *inter alia* that a blockade notified directly by the commander of the blockading fleet to the governor of the blockaded port was not a valid blockade. In respect to this contention, it was said by the court: "The usual mode of communicating such intelligence undoubtedly is not to the hostile government, but to the neutral states, and when the more regular form is practicable, it is proper that it should be observed. But here it was not practicable. Sir Home Popham took the only method that could be adopted, by sending to the governor of the place, and by desiring him to make it known to the subjects of neutral powers, who had no public agents or consuls resident there, to whom it could be more formally addressed. From papers exhibited in another case, it appears that the steps which the governor took were of the most formal and effectual kind. He summoned all the foreign ship-masters before him, and among them the master of this vessel. He communicated to them the letter which he had received, and told them that the port was under blockade, and that they must take notice of it at their peril. They were also required to sign a paper to the effect of that notice, but they refused, that they might not appear to bind themselves by their own voluntary act."

In the *Hiawatha* (1861) (Blatch., 1, 18, 19), the court said that "from the indubitable rule of law prevailing in the English prize courts, a notice of blockade to the officials of a neutral government is sufficient to the subjects of the neutral nation. Lord Stowell says: 'A neutral master can never be heard to aver, against a notification

of blockade,' to his own government, 'that he is ignorant of it.' (The *Neptunus*, 2 Ch. Rob., 113.) Again he says, that a public declaration is not necessary to constitute notice of it; and that if the individual concerned is personally informed of the fact, the purpose of notice is still better obtained than by a public declaration. (The *Mercurius*, 1 Ch. Rob., 83.) And such is the American rule. (1 Kent's Comm., 147; Wheaton on Captures, 193 to 199.)

"In this instance every particular necessary to constitute a specific notification of the blockade to the ship, excepting serving it personally on her master or owners, concurred to fix the presumption that full knowledge of the fact was possessed by her master and one of her owners before acts were entered upon by her in violation of it; the resident minister of the neutral government had official notice; the consul of the nation residing at the blockaded port apprised Lord Lyons on the 5th of May that he had cautioned persons in Richmond, there representing the owners of the ship, against her having the right of egress at that time, except in ballast, but they would not consent to her so going; and, on that evidence, it aggravates the force of the presumption against the integrity of the master and part owner there present for them to deny any notice of the blockade. The warning, if indorsed on the register, would only be evidence in protection if the vessel should be again arrested for the attempt made prior to the date of the warning, and would be evidence for her conviction should the effort be renewed afterwards. There is no ground, in national law or the reason of the thing, for claiming that a neutral vessel may commit the warlike act of violating wilfully a legal blockade if not found carrying on her register a written warning against so doing."

EXTENSION AND RE-ESTABLISHMENT OF BLOCKADE SUBJECT TO RULES AS TO DECLARATION AND NOTIFICATION.

The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.—*Article 12, Declaration of London, 1909.*

"Supposing a blockade is extended beyond its original limits, as regards the new part, it is a new blockade and, in consequence, the rules as to declaration and notification must be applied to it. The same is true in cases where a blockade is reestablished after having been raised: the fact that a blockade has already existed in the same locality must not be taken into account."

General report of drafting committee to London Naval Conference.

"Article 37. * * * The same formalities shall be observed when a blockade which has ceased to be effective has been re-established and when a blockade is extended to new points."

Institute (1882), p. 52.

In discussing the case of the *Hoffnung* (6 C. Rob. 112) where a blockade had been raised and the blockading squadron later returned to its station off the port, Wheaton says: "A question was raised whether the notification which had issued was not still operative; but the court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force. But in a subsequent case, where it was suggested that the blockading squadron had actually returned to its former station off the port, in order to renew the blockade, a question arose whether there had been that notoriety of the fact, arising from the operation of time, or other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties. Among other modes of resolving this question, a prevailing consideration would have been the length of time, in proportion to the distance of the country from which the vessel sailed. But as nothing more came out in evidence than that the squadron came off the port on a certain day, it was held that this would not restore a blockade which had been thus effectually raised, but that it must be renewed again by notification, before foreign nations could be affected with an obligation to observe it. The squadron might return off the port with different intentions. It might arrive there as a fleet of observation merely, or for the purpose of only a qualified blockade. On the other hand, the commander might attempt to connect the two blockades together; but this is what could not be done; and, in order

to revive the former blockade, the same form of communication must have been observed *de novo* that is necessary to establish an original blockade."

Wheaton, p. 660.

"A blockade ceases, whenever the vessels which constitute it are withdrawn, whether with or without compulsion from the enemy, so that the undertaking is for the time, at least, abandoned. If the vessels return after leaving their stations, the commencement of a new blockade requires the same notification as before. Common fame in regard to the breaking up of a blockade will justify a neutral in sailing for the blockaded port, although, as we have seen, it is not sufficient notice to him: he ought to have more evidence of an interference with the normal state of things than he needs to have of a return to it."

Woolsey, p. 347.

"A blockade can * * * come to an end through an enemy force driving off the blockading squadron or fleet. In such case the blockade ends *ipso facto* by the blockading squadron being driven away, whatever their intention as to returning may be. Should the squadron return and resume the blockade, it must be considered as new, and not simply the continuation of the former blockade, and another declaration and notification are necessary."

Oppenheim, vol. 2, p. 460.

"The blockade once established must be continuously maintained. If its reality is interrupted, even for a short time, subject to the question to be mentioned about interruption by weather, the legal effect will not be merely to free from penalties the vessels which have entered or left the port during that time, but to render necessary the re-establishment of the blockade in the manner necessary for the first establishment of one. This was questioned by the United States in their great blockade of the Confederate coast, in a case of which Mr. Seward wrote to Lord Lyons,[1] 27 May 1861: 'We are informed that the *Niagara*,' blockading Charleston, 'was replaced by the steamer *Harriet Lane*, but that owing to some accident the latter vessel failed to reach the station as ordered until a day or two after the *Niagara* had left * * * This government holds that the blockade took effect at Charleston on the 11th day of this month, and that it will continually be in effect until notice of its relinquishment shall be given by proclamation of the president of the United States. Professor Bernard, on this, expresses the contrary view as follows. 'Mr. Seward was mistaken * * * The temporary absence of the blockading force, if it be such an absence as to remove the risk of capture, not only impairs the blockade but discontinues it, unless the absence be involuntary and caused by stress of weather. If the blockading ships be blown off by a gale, the reasonable presumption is that they will return as soon as weather permits, and the neutral trader is therefore bound by that presumption. But no such presumption arises when they are sent away on other service, nor even where without orders they chase to a distance from the port. Nor is

[1] Vol. 55, British State Papers, p. 673.

the neutral bound to enquire whether the intermission is due to a miscalculation on the part of the government, or to mistake or disobedience on the part of its officers, or to any accidental cause.'"

Westlake, vol. 2, pp. 271, 272.

"ART. 23. If a blockade, after having been raised, is enforced anew, or if the area of the blockade is altered, a fresh declaration of blockade must be issued in accordance with the previous Article."

Japanese Regulations, 1904.

"70. Should a blockade be extended beyond its original limits, a new declaration must be issued and made known, covering the area over which the blockade has extended.

"When a blockade, after being raised, is again established, a new declaration and notification is necessary."

German Prize Rules, 1909.

"71. The same formalities should be observed if the blockade is extended to some new point on the coast, or is resumed after having been raised."

French Naval Regulations, 1912.

Article 12 of Declaration of London, 1909, substantially appears as Art. 93 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The following summary of a letter, dated October 25, 1801, from the American Secretary of State to the Minister to Spain is given in Moore's Digest, Vol. 7, p. 842: "When a blockade has been abandoned and then renewed, there should be either a new proclamation by the blockading sovereign, or vessels making for the blockaded port (after notice of the withdrawal) ought to be 'premonished of their danger and permitted to change their course as they might think proper.'"

"The blockade of Charleston, South Carolina, was carried into effect on May 11, 1861, when the U. S. S. *Niagara* took her position there. Subsequently, the *Niagara* was ordered to be replaced by the steamer *Harriet Lane*, but, owing to some acccident, the latter failed to reach the station till a day or two after the *Niagara* had left. Without discussing the effect that this absence of the blockading force might have on any vessel that had entered or departed during that brief time, Mr. Seward maintained that it had not so far impaired the blockade as to render necessary a new notice of its existence. Mr. Seward, Sec. of State, to Lord Lyons, British min., May 27, 1861, MS. Notes to Great Britain, VIII. 429."

Moore's Digest, vol. 7, p. 843.

"In a circular of Feb. 5, 1863, to the members of the diplomatic corps, Mr. Seward, referring to 'recent events' at Galveston, Texas, which might create an impression that the blockade of that port had been 'interrupted', said that the blockade 'was resumed immediately and will be continued until further notice,' and that, 'although due notice of such resumption will probably have been

given by the commander of the blockading squadron to vessels which may attempt to enter Galveston, it is deemed advisable to communicate a similar notice to you.' (MS. Notes to Netherlands Leg. VI. 228.)"

Moore's Digest, vol. 7, p. 843.

The case of the *Hoffnung* (1805) (6 C. Rob. 112) was one where a neutral vessel was captured for breach of the blockade of Cadiz. This blockade as originally established had been duly notified to neutral powers. The blockading force was subsequently driven off by the enemy. On the return of the blockading squadron the reestablishment of the blockade was not notified. The *Hoffnung* had left her port of departure in ignorance of the re-established blockade.

Sir William Scott in delivering the opinion of the court said: "When a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces, therefore, a very different train of presumptions in favor of the ordinary freedom of commercial speculations. In such a case, the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed, and, therefore, if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, which has been so effectually interrupted. On this principle it was that the court held the former blockade to have become extinct, and intimated an opinion that there should be a repetition of the same measures, on its recommencement, to bring it to the knowledge of neutral states, either by public declaration, or by the notoriety of the fact."

The *Peterhoff* (1866) (5 Wall. 28). The court said: "We know of no judicial precedent for extending a blockade by construction. But there are precedents of great authority the other way. We will cite one.

The *Frau Ilsabe* [4 C. R. 63] and her cargo were captured in 1799 for breach of the British blockade of Holland. The voyage was from Hamburg to Antwerp, and, of course, in its latter part, up the Scheldt. Condemnation of the cargo was asked on the ground that the Scheldt was blockaded by the blockade of Holland. But Sir W. Scott said, "Antwerp is certainly no part of Holland, and, with respect to the Scheldt, it is not within Dutch territory, but rather a coterminous river, dividing Holland from the adjacent country." This case is the more remarkable inasmuch as Antwerp is on the right bank of the river, as is also the whole territory of Holland; and, though no part of that country was part of Flanders, then equally with Holland combined with France in a war with Great Britain. "It was just as lawful," as Sir W. Scott observed, "to blockade the ports of Flanders as those of Holland," and the Scheldt might have been included in the blockade, but he would not hold it necessarily included in the absence of an express declaration.

NOTIFICATION TO BE GIVEN OF VOLUNTARY RAISING OF BLOCKADE, OR RESTRICTION IN ITS LIMITS.

The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.—*Article 13, Declaration of London, 1909.*

"If it is indispensable to know of the establishment of a blockade, it would at least be useful for the public to be told of its raising, since it puts an end to the restrictions imposed on the relations of neutrals with the blockaded port. It has therefore been thought fit to ask the power which raises a blockade to make known the fact in the form in which it has notified the establishment of the blockade. (Art. 11.) Only it must be observed that the sanction could not be the same in the two cases. To insure the notification of the declaration of blockade there is a direct and adequate sanction; an unnotified blockade is not binding. In the case of the raising there can be no parallel to this. The public will really gain by the raising, even without being told of it officially. The blockading power which did not notify the raising would expose itself to diplomatic remonstrances on the ground of the nonfulfillment of an international duty. This nonfulfillment will have more or less serious consequences, according to circumstances. Sometimes the raising of the blockade will really have become known at once, and official notification would add nothing to this effective publicity.

"It is needless to add that only the voluntary raising of a blockade is here in question; if the blockading force has been driven off by the arrival of enemy forces, it can not be held bound to make known its defeat, which its adversary will undertake to do without delay. Instead of raising a blockade, a belligerent may confine himself to restricting it; he only blockades one port instead of two. As regards the port which ceases to be included in the blockade, it is a case of voluntary raising, and consequently the same rule applies."

General report of drafting committee to London Naval Conference.

"Article 38. If the blockading vessels leave their position for any other reason than stress of weather, the blockade is considered as raised; it should then be again declared and notice again given."

Institute (1882), p. 52.

"Article 92. *Armistice.* * * * Blockades established at the time of the armistice are not raised unless by a special stipulation of the agreement. * * *"

Institute (1913), p. 195.

"A public blockade once established and duly notified, must be presumed to continue until notice of discontinuance, in the absence of positive proof of discontinuance by other evidence; and it is not

enough that the master and mate of the captured vessel swear that they saw no blockading ships off the port."

Kent, vol. 1, p. 151, note.

In case formal notice of blockade has been given by the belligerent to neutral governments, "similar notice must be given of the discontinuance of a blockade, as far as possible. For a wrong is done to neutrals, if they are left to find out as they can that a blockade is terminated, since a long time may elapse before it will be considered safe to return to the old channel of commerce."

Woolsey, pp. 345, 346.

According to both the English and French theory of blockade, "the limitations imposed on neutral commerce by the right of blockade depend for their validity solely upon the fact that a blockade really exists at any given moment. A belligerent therefore has no power to subject a neutral to penalties from the time that a port ceases to be effectively watched, and the government of the United States was undoubtedly wrong in holding the opinion put forward by it in 1861, that a blockade established by notification continues in effect until notice of its relinquishment is given by proclamation. It is no doubt the duty of a belligerent state which has formally notified the commencement of a blockade to give equal and immediate publicity to its discontinuance, but a vessel bound for or approaching a port at a time between the actual cessation of blockade and the public notification of the fact is not liable to confiscation. If a ship is captured under such circumstances, the utmost, but also the legitimate, effect of a notification is that the neutral, who has probably started with the intention of violating the blockade, and whose adventure has since become innocent from events with which he has had nothing to do, is bound to prove the existence of a state of facts which frees his property from the penalty to which it is *prima facie* exposed. The presumption of the court will be that a regularly notified blockade continues to exist until that presumption is displaced by evidence. In the case of a *de facto* blockade the burden of proof lies always upon the captor."

Hall, pp. 730–731.

Limited Blockade.

"A blockade may be limited, so long as, first, the belligerent power enforcing it does not reserve for its own subjects any means of access or of commerce which it forbids to neutrals; secondly, the relaxations of the general rules of blockade are not inconsistent with the existence of any blockade at all; thirdly, the relaxations are notified to neutral states, so that their subjects may be fully apprised of what they may or may not do. The object of a blockade being the interruption of commerce, one can scarcely quote as an example of a limited blockade the fact that during the American civil war neutral ships of war had free access to the blockaded coast.

Westlake, vol. 2, p. 273.

On May 12, 1862, (12 U. S. Stat., 1263), a proclamation was issued formally announcing the raising of the blockade of certain ports

within the proclamation of April 19, 1861, and that commercial intercourse would be permitted with these ports, "except as to persons, things, and information contraband of war."

On the same date the Treasury Department issued the following regulations governing trade with the opened ports:

"To vessels clearing from foreign ports, destined to ports opened, licenses will be granted by Consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war, either to or from the said ports, which licenses shall be exhibited to the Collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs, according to law, showing no violation of the conditions of the license. Any violation of said conditions will involve the forfeiture and condemnation of the vessel and cargo, and the exclusion of all parties concerned from any further privilege of entering the United States during the war for any purpose whatever.

"In all other respects the existing blockade remains in full force and effect as hitherto established and maintained, nor is it relaxed by the Proclamation [of May 12, 1862] except in regard to the ports to which the relaxation is by that instrument expressly applied."

The proclamation of February 18, 1864, (13 U. S. Stat., 740), announced the raising of the blockade of Brownsville, Texas, and permitted the resumption of commercial intercourse. This proclamation, however, "does not authorize or allow the shipment or conveyance of persons in, or intending to enter, the service of the insurgents, or of things or information intended for their use, or for their aid or comfort, nor, except upon the permission of the Secretary of War, or of some officer duly authorized by him, of the following prohibited articles, namely: cannon, mortars, firearms, pistols, bombs, grenades, powder, saltpeter, sulphur, balls, bullets, pikes, swords, boarding-caps, (always excepting the quantity of the said articles which may be necessary for the defence of the ship and those who compose the crew,) saddles, bridles, cartridge-bag material, percussion and other caps, clothing adapted for uniforms, sailcloth of all kinds, hemp and cordage, intoxicating drinks, other than beer and light native wines."

See also the proclamations of November 19, 1864, of April 11, 1865, and of May 22, 1865, (13 Stat., 750, 753, 757), raising the blockade as to certain other parts, and the proclamation of June 23, 1865, (13 id., 768), raising the entire blockade announced by the proclamations of April 19 and 27, 1861.

If blockading vessels "leave their stations voluntarily, except for purposes of the blockade, such as chasing a blockade runner, or are driven away by the enemy's force, the blockade is abandoned or broken. As the suspension of the blockade is a serious matter, involving a new notification, commanding officers will exercise especial care not to give grounds for complaints on this score."

Instructions to United States Blockading Vessels, Navy Department General Orders, No. 492, June 20, 1898.

"ART. 139. As soon as a Blockade ceases, from any cause, the Commander of the Squadron should take all necessary steps to make known the fact."

Naval Prize Law, Holland.

"ART. 37. * * * If the blockading force leave its station voluntarily, except for purposes of the blockade, or is driven away by the enemy, the blockade is abandoned or broken. The abandonment or forced suspension of a blockade requires a new notification of blockade."

United States Naval Code, 1900.

"ART. 31. When a blockade is raised, the commander of the blockading fleet or warship must at once report the fact to the Minister of Marine, and take all necessary steps to make the fact generally known."

Japanese Regulations, 1904.

"71. If a blockade is voluntarily raised, or narrowed in its extent, this is to be made known as provided in 67."

German Prize Rules, 1909.

"73. The raising of a blockade, as well as any restrictions in its limits, must be notified in the same manner as above."

French Naval Regulations, 1912.

Article 13 of Declaration of London, 1909, substantially appears as Art. 94 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Effect of Occupation as to Limiting Blockade.

"The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing, the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does such occupation terminate such a blockade proclaimed and maintained not only against the city, but against the port and district commercially dependent upon it and blockaded by its blockade. The *Circassian*, 2 Wall. 135.

"Wharton in his International Law Digest, III, 364, following Hall (3ed.[1]), 656, says: 'This ruling conflicts with Thirty Hogsheads *v.* Boyle, 9 Cranch, 191. Damages were afterwards given by the mixed commission to the owners of the *Circassian*.

"He also quotes Lorimer, Law of Nations, 145, who says: 'A British ship, the *Circassian*, was actually seized and confiscated by the American prize court for attempting to run the blockade at New Orleans after New Orleans had been retaken and was in possession of the North, and she was restored only under the mixed commission appointed by the treaty of Washington at the close of the war.

"There is nothing in these comments to indicate that the decision had been carefully examined, and it is obvious that Lorimer, since he speaks of the ship having been 'restored' by the mixed commis-

[1] 4th ed., 690.

sion, was not acquainted either with the powers or the proceedings of that body.

"It may be accepted as self-evident, as a general proposition, that the capture of a blockaded port by the blockading belligerent terminates his blockade of such port, since he could hardly blockade himself: nor does it necessarily appear that this proposition was denied in the case of the *Circassian*. The facts were that the Government of the United States, by a formal proclamation, assumed to continue the blockade of the port of New Orleans till July 1, 1862, though the occupation of the city of New Orleans was effected by the United States troops on the 2d of May. The port of New Orleans and the City of New Orleans were not the same; and the court drew a sharp distinction between the two things. 'It may be well enough conceded,' said the court, 'that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supercede it. But, at the time of the capture of the *Circassian* there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade.' Mr. Justice Nelson, however, in his dissenting opinion, contended that at the time when the vessel was seized both 'the city and port of New Orleans were reduced, and full authority of the United States extended and held over them.' (2 Wall. 150, 156.)

"The same difference of opinion as to the facts apparently existed in the mixed commission, which, by a majority of votes, awarded compensation to the owners of the vessel. Although the award does not disclose the reasons on which it was founded, the dissenting opinion of Mr. Frazer, the American commissioner, indicates that they were the same as those maintained by Mr. Justice Nelson. Mr. Frazer's dissent was based solely upon the facts. At the close of an extended opinion, he said: 'Comments and criticisms upon the judgment of the court had fallen under my eye; trusting to which, I confess, I had been somewhat impressed with serious doubts (to say the least) of the legality of the condemnation. But a very careful study of the case shows that, in making such criticisms, no account has been taken of the important fact that the possession of the United States forces at New Orleans did not extend to the whole port when the ship was seized; no such entire possession being anywhere directly asserted. That the error is one of inference, resulting from the fact, doubtless, that the wider area of the port, is contradistinguished from the city of the same name, has usually escaped attention. It follows, therefore, that the principle supposed to be violated by the court was really not violated at all, and that the question was not that which has sometimes been supposed. It is not, I may hope, improper to say that the best care and judgment which I am able to bring to the consideration of the case has resulted in a clear conviction that the condemnation of the *Circassian was correct*.'"

Moore, Int. Arbitrations, IV. 3911, 3920, 3922.

"'It is advisable, where the exercise of a belligerent right is in doubt, to avoid, so far as practicable, a strained interpretation of the facts for the purpose of supporting the belligerent claim.' (Mr.

Day, Sec. of State, to Secretary of Navy, July 19, 1898, 230 MS. Dom. Let. 272)."

Moore's Int. Law Dig. vol. 7, p. 842.

"The blockade of the *coast of Louisiana*, as established on the coast of the Southern States generally, by the President's proclamation of April 19, 1861, was not terminated by the capture of the forts below New Orleans by Commodore Farragut and the occupation of the city by General Butler, and the proclamation of the President of the 12th of May, 1862, declaring that after June 1 the blockade of the port of New Orleans should cease. It therefore remained in force at Calcasieu, on the western extremity of the coast of Louisiana. The *Baigorry*, 2 Wall. 474; The *Josephine*, 3 Wall. 83."

Moore's Digest, vol. 7, p. 840.

"A vessel having been captured by a United States cruiser on June 29, 1898, for attempting to go to Guantanamo, Cuba, of which a blockade had been established by Admiral Sampson, it was contended that, at the time of the capture, the port of Guantanamo was in the possession and control of the United States and that the blockade was thereby terminated. The town of Guantanamo is eighteen miles from the mouth of Guantanamo Bay. The harbor was held by United States naval vessels and by a party of marines who occupied the crest of a hill on the west side of the harbor near its entrance, but the town at the head of the bay was still held by the Spanish forces, as were several other positions near by, and the campaign in the neighborhood was in active progress, and encounters between the American and Spanish troops were of frequent occurrence. Under these circumstances the court held that 'the blockade was still operative as against vessels bound for the city of Guantanamo. The occupation of the city,' continued the court, 'terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.' The *Adula*, 176 U. S. 361; affirming 89 Fed. Rep. 351, and citing the *Circassian*, 2 Wall. 135."

Moore's Digest, vol. 7, p. 842.

Sir William Scott, in the *Neptunus* (1799) (1 C. Rob. 170), said: "There are two sorts of blockade; one by the simple fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases, otherwise than by accident or the shifting of the wind), there is immediately an end of the blockade; but when the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, I apprehend *prima facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it. To suffer the fact to cease, and to apply the notification again, at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose any country would pursue. I do not say that a blockade of this sort may not in any possible case expire *de facto*, but I say, such a

conduct is not hastily to be presumed against any nation. And therefore, till such a case is clearly made out, I shall hold, that a blockade by notification is, *prima facie*, to be presumed to continue till the notification is revoked."

In the *Neptunus* (1799) (2 C. Rob. 110), Sir William Scott said:— "The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be nugatory, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade de facto only, it may be otherwise; but this is a case of a blockade by notification. Another distinction between a notified blockade and a blockade existing *de facto* only, is, that in the former the act of sailing for a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up; and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing de facto only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination."

The *Circassian* (1864) (2 Wall. 135), quoting from the syllabus: "A public blockade, that is to say, a blockade regularly notified to neutral governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion or under direction of his superiors, must, in the absence of clear proof to the contrary, be presumed to continue until notification is given by the blockading government of its discontinuance."

See also the *Baigorry*, 2 Wall., 474.

The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.—*Article 14, Declaration of London, 1909.*

"For a vessel to be liable to capture for breach of blockade, the first condition is that she must be aware of the blockade, because it is not just to punish some one for breaking a rule which he does not know. Nevertheless, there are circumstances in which, even in the absence of proof of actual knowledge, knowledge may be presumed, the right of rebutting this presumption being always reserved to the party concerned."

General report of drafting committee to London Naval Conference.

"3. * * * There is a breach of the blockade when a merchant vessel, having information of the blockade, attempts by force or strategy to penetrate the line of the blockade."

Institute (1877), p. 15.

The judicial decisions in both England and the United States invariably "admit that the neutral must be chargeable with knowledge, either actual or constructive, of the existence of the blockade, and with an intent, and with some attempt, to break it, before he is to suffer the penalty of a violation of it. The evidence of that intent, and of the overt act, will greatly vary, according to circumstances; and the conclusion to be drawn from those circumstances will depend, in some degree, upon the character and judgment of the prize courts; but the true principles which ought to govern have rarely been a matter of dispute. The fact of clearing out or sailing for a blockaded port is, in itself, innocent, unless it be accompanied with knowledge of the blockade. Such a vessel not possessed of such previous knowledge is to be first warned of the fact, and a subsequent attempt to enter constitutes the breach. This was the provision in the treaty with England, in 1794, and it has been declared in other cases, and is considered to be a correct exposition of the law of nations."

Kent, vol. 1, p. 155.

"Where a neutral vessel is intercepted on her passage, with a cargo *from* a blockaded port, and the cargo is proved to have been shipped after the blockade had commenced, and was known at the port, the party is precluded from denying his knowledge of its existence. The personal ignorance of the master, in such a case, could only have arisen from a fraudulent determination not to know,—an obstinate exclusion of knowledge it was his duty to have acquired; and if his personal ignorance could be proved, it would not form even an equitable defense. He is, therefore, very justly precluded from denying his knowledge of what it is morally impossible he should have been ignorant, except for a fraudulent intent." * * *

In case "the neutral vessel is intercepted on her egress from a blockaded port, with a cargo shipped immediately after the block-

ade had commenced, and while it might have been unknown to the inhabitants of the port when the vessel sailed, the party will be allowed to rebut the presumption of law by satisfactory proof, of his ignorance of the establishment of the blockade. In all cases of this kind, where the presumption of knowledge is not absolute and conclusive, the neutral claimant is allowed to prove his own innocence. And the captor can judge from the nature and circumstances of each particular case, whether the neutral vessel is acting in good faith, and is really ignorant of the existence of the blockade, or whether the pretended ignorance is a mere fraudulent attempt to deceive."

"Where there are no legal or probable grounds for imputing to the master of a neutral vessel the knowledge of the existence of a blockade which he is charged to have violated, it rests upon the captor to establish the fact of this knowledge by positive evidence. To warrant a condemnation, the proof must be clear and definite that such vessel had been duly notified of the blockade, and had undertaken or prosecuted the voyage in defiance of the notice or warning. * * * Proof of the actual knowledge of the party at the inception of the voyage, supersedes, in all cases, the necessity of a warning, nor is it of any importance by what means or in what form he received the information, if the information was credible in its nature, and came in such a form and from such a source as to leave no reasonable ground on his mind as to its authenticity; he is not permitted to aver that he placed no confidence in a communication that had just claims to his belief."

Halleck, pp. 550–552.

"Equity requires that the neutral should have had time to receive notice of the blockade. Hence, a ship from a distance, as from across the Atlantic, may attempt to enter a port actually invested, without exposing itself to penalties.

"It cannot be said in justice, that a shrewd suspicion of a blockade is enough to make a vessel guilty in sailing for a certain port, for a known or a knowable fact must precede guilt. On the other hand, a fair possibility derived from the expectation of peace, or from other sources, that a blockade is raised, may justify a vessel in sailing contingently for the port in question with the intention of inquiring at the proper place into the fact."

Woolsey, p. 346.

"Since breach of blockade is, from the standpoint of the blockading belligerent, a criminal act, knowledge on the part of a vessel of the existence of a blockade is essential for making her egress or ingress a breach of blockade.

"It is for this reason that Continental theory and practice have never considered a blockade established without local and diplomatic notification, so that every vessel might have, or might be supposed to have, notice of the existence of a blockade. And for the same reason some States, as France and Italy, have never considered a vessel to have committed a breach of blockade unless a special warning was given her before her attempted ingress by one of the blockading cruisers stopping her and recording the warning upon her log-book.

"British, American, and Japanese practice regarding the necessary knowledge of the existence of a blockade on the part of a vessel

has always made a distinction between actual and constructive notice, no breach of blockade having been held to exist without either the one or the other. Actual notice has been considered knowledge acquired by a direct warning from one of the blockading men-of-war or knowledge acquired from any other public or private source of information. Constructive knowledge has been presumed knowledge of the blockade on the part of a vessel on the ground either of notoriety or of diplomatic notification."

Oppenheim, vol. 2, 466.

"ART. 115. The Master will be held to have had Actual Notice if he is shewn to have had knowledge of the Blockade, in whatever way he may have acquired such knowledge, whether by direct warning from a belligerent cruiser,[1] or from any other source of information, public or private."

"ART. 116. Whether the master has had Actual Notice must be ascertained by personal inquiry from the Master and Crew and by examination of the Vessel's papers. The Commander should especially examine the Charter-party and Bills of Lading, to see whether they contain any recitals as to the Blockade: also the Log and the Certificate of Registry, or other Document denoting the Vessel's Nationality, to see whether any warning of the Blockade has been inscribed thereon."

Naval Prize Law, Holland.

"ART. 117. The existence of a Blockade is presumed to be notorious to Vessels within the line of Blockade. No other proof of Notice is therefore necessary in a case of Breach of Blockade outwards.[2] A Blockade may also, under certain circumstances, be notorious to Vessels not within the line of Blockade. Whether or no this is the case, is a question which each Commander must decide for himself upon consideration of all the circumstances,[3] such as:

"1. With reference to the Blockade itself; the length of time it has been instituted; the number of Vessels warned and captured.

"2. With reference to the place blockaded; its locality, its importance, its facility of communication with places commercially connected with it.

"3. With reference to the Vessel stopped; the port from which she sailed, the time when she sailed; the course of her voyage; the probability of her having received information either from cruisers or merchant vessels, or at intermediate ports."

Naval Prize Law, Holland.

"11. Merchant vessels of neutral nationality are liable to condemnation as prizes in the following cases:— * * *

"(2) When such vessels are found breaking a blockade, and it is not proved that the masters were unaware of the establishhent of the blockade; * * *"

Russian Prize Regulations, 1895.

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[1] "Such warning is held by Great Britain, the United States, Russia, and Denmark, to be only one out of many ways in which a vessel is affected with Notice; *Neptunus*, 2 C. Rob. 110. *Franciska*, 10 Moore P. C. 37; while France, Spain, and Sweden insist upon the necessity for individual warning in every case."

[2] *Vrow Judith*, 1 C. Rob. 150.

[3] *Hoffnung*, 6 C. Rob. 112. *Tutela*, 6 Rob. 177. *Franciska*, Spinks, 111.

"Art. 39. The notification of a blockade must be made before neutral vessels can be seized for its violation. * * *"

United States Naval Code, 1900.

"Art. 25. In cases where the master of a ship has received direct warning from a Japanese warship, or where it is clear that he has become aware, either through public or private information, or by any other means whatsoever, of the existence of the blockade, he shall be held to have received actual notice of the said blockade."

Japanese Regulations, 1904.

"Art. 28. of the Japanese Regulations relating to Capture at Sea, 1904, provides for exemption from capture in the following case:

"(2) When a ship which has entered port during the blockade without having received notice of its establishment leaves port without a cargo."

"Art. 64. In the case of a ship which is exempted from capture, either because she has not received notice of the blockade, or because she comes under clause 2 of Article 30, or because, as specified in Article 36 and Article 38, she was not aware of the fact that hostilities had broken out, the visiting officer shall enter in the ship's log, or in the papers which show her nationality, a warning in accordance with Form 2 or Form 3 and order her to turn back, or take suitable steps to make her change her course in some other direction, &c."

Japanese Regulations, 1904.

"72. A ship can be seized for breach of blockade only when it had knowledge of the blockade, or such knowledge on its part can be assumed."

"73. In judging whether the knowledge existed or not, are to be considered:—

(a) The progress and reach of the notification (see 67);

(b) that the blockade declaration in German and allied ports will be published as soon as possible.

(c) that the existence of the blockade will not be known immediately in the enemy ports."

German Prize Rules, 1909.

"75. The liability of a neutral ship to seizure for violation of blockade is dependent upon its real or presumed knowledge of the blockade."

French Naval Regulations, 1912.

Article 14 of Declaration of London, 1909, substantially appears as Art. 95 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of this notification is not material. It may be actual, as by a vessel of a blockading force, or constructive, as by a proclamation of the government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize and should be sent in for adjudication;

but, should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral."

Instructions to United States Blockading Vessels, Navy Department General Orders, No. 492, June 20, 1898. (For. Rel. 1898, 780.)

"To justify the exercise of the right of blockade, and legalize the capture of a neutral vessel for violating it, a state of actual war must exist, and the neutral must have knowledge or notice that it is the intention of one belligerent to blockade the ports of the other."

Moore's Digest, vol. 7, p. 785.

"In numerous treaties negotiated by the United States it is pro vided that, notwithstanding a diplomatic general notice of blockade, a neutral vessel can not be condemned for blockade running unless she had notice en route that the place in question was blockaded. (Treaty with Sweden, September 4, 1816; July 14, 1827; with Prussia, May 1, 1828; with Greece, December 10, 1837; with Sardinia, November 26, 1837.) In other treaties special notification is made dependent on the question of the knowledge or ignorance of the party seized. (Treaty of the United States with Great Britain, November 28, 1795; with France, September 30, 1800; with Hayti, November 3, 1864; with Italy, February 27, 1871.) 'But notwithstanding these treaties, the Government of the United States seems to look upon the diplomatic notice as superfluous, and to exact in all cases a special notification. The instructions of May 14, 1846, relating to the blockade of Mexican ports prescribe that no neutral vessel entering into a blockaded port can be captured or detained unless it has received from one of the blockading squadron special notice of the existence.' (Martens Nouv. rec. IX. 167.) The proclamation of President Lincoln of April 19, 1861, declares that if, with the intention to violate the blockade, a ship attempts to leave or to enter one of the blockaded ports, there must be an examination by the commander of one of the blockading vessels, who shall take due note of the fact and date of the notice. Lord Lyons to Lord Russell, May 2, 1861; Mr. Seward to the Minister of Spain, Archiv. Dip., 1861, ii, 265; iii. 438, 443. But the American prize courts have not accepted this opinion of the Executive, and courts have declared that a vessel could be taken prize without special notice, if the officers of the vessel had knowledge of the blockade, and were consequently chargeable with bad faith. (The *Circassian*, 2 Wall. 135.)"

Moore's Digest, vol. 7, pp. 827, 828.

"The approach of a vessel to the mouth of a blockaded port for inquiry—the blockade having been generally known—is itself a breach of the blockade, and subjects both vessel and cargo to condemnation. * * *

"'If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade.' Field. J., The *Cheshire*, 3 Wall. 231, 235; s. p., The *Spes*, 5 C. Rob. 80; The *Charlotte Christine*, 6 C. Rob. 101."

Moore's Digest, vol. 7, p. 829.

"Under the proclamation of the President of April 19, 1861, only those who are ignorant of the blockade are entitled to the warning

and indorsement mentioned in the proclamation. The *Reform* (1862), 2 Sprague, 107."

Moore's Digest, vol. 7, p. 821.

In the case of the *Neptunus* (1799) (2 C. Rob. 110, Scott. 796), a vessel sailed from a neutral port to Havre that was under blockade that had been formally notified. Before reaching Havre she fell in with the English fleet and made inquiries as to whether Havre was at that time under blockade. She was informed by the commander of an English frigate that "it was not blockaded." Acting on this information the *Neptunus* proceeded on her voyage and was later captured for alleged breach of blockade by an English naval vessel. At the prize hearing Sir William Scott held that as the blockade had been formally notified the *Neptunus* was undoubtedly *in delicto* from the time she left her port of departure and could properly have been captured by the English fleet. The capture not having been made and the master being informed that Havre was not blockaded, "under these circumstances, I think that after this information he is not taken *in delicto*. I do not mean to say that the fleet could give the man any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed that such a fleet as that was, would be ignorant of the fact.

"From that time I consider that a state of innocence commences: the man was not only in ignorance, but had received positive information that Havre was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offence against him: it would be to press a pretty strong principle rather too strongly." The vessel and cargo were restored to its owners.

In Yeaton *v.* Fry (1809) 5 Cranch, 335, it was held, quoting from the syllabus, that "a vessel sailing ignorantly for a blockaded port is not liable to condemnation under the law of nations."

The Prize Cases (1862) (2 Black 635): "A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations."

One of the defenses interposed in the case of the *Louisa Agnes* (1862) (Blatch. P. C. 107), a neutral vessel captured for alleged violation of blockade, was "that the vessel was entitled to be warned off the blockaded port, and that, on such warning being given, she became discharged of all culpability by having immediately obeyed the notice, and changed her course, under the direction of the blockading vessel, for Baltimore and continued that course for a succession of days, until her ultimate arrest. This objection would be of avail under the general law, in case her approach to the blockaded ports was innocent, and in ignorance of their condition, without regard to the prerequisite of warning supposed to be connected with the imposition of blockades by the proclamation of the President. Because the doctrine that, in order to affect a neutral with the penal consequences of a violation of blockade, it is necessary for him to have been *sufficiently* informed of its existence. (The *Rolla*, 6 Ch. Rob., 367) is not contested in this suit, nor has it been in any previous prosecutions here. The rule administered in this court has been, both before and since the act of Congress of August 6, 1861.[1]

[1] An act approving "all the acts, proclamations, and orders of the President" subsequent to March 4, 1861, relating to the Army and the Navy.

(12 U. S. Stat. at Large, 326, sec. 3,) that an attempt by a neutral vessel to enter or evade a blockaded port, with knowledge or notice of the blockade, was a culpable violation of it, although no warning in writing was given to such vessel. The act itself, committed by a neutral, in fraud of a belligerent right, carries with it the consequence of condemnation, whatever plausible pretences may be alleged for the visit. (Upton on Maritime War and Prize, 192.)"

In the *Cheshire* (1865) (3 Wall. 231), the Supreme Court said that "intention to break the blockade is to be presumed from the position of the ship when captured. As already stated, she knew of the blockade when she sailed from Liverpool; she had no just reason to suppose it had been discontinued; her approach, under these circumstances, to the mouth of the blockaded port for inquiry was itself a breach of the blockade, and subjected both vessel and cargo to seizure and condemnation. The rule on this point is well settled, and is founded in obvious reasons of policy. If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade; the liberty of inquiry would be a license to attempt to enter the blockaded port; and that information was sought would be the plea in every case of seizure. With a liberty of this kind the difficulty of enforcing an efficient blockade would be greatly augmented. If information be honestly desired, it must be sought from other quarters. In the case of the *James Cooke*, [Edw. 263], the ship was captured at the entrance of the Texel, and the court applied this rule, observing that the approach of the ship to the mouth of a blockaded port, even to make inquiry, was, *in itself*, a consummation of the offence, and amounted to an actual breach of the blockade."

See to the same effect, The *Josephine*, 3 Wall., 84.

The *Adula* (1900) (176 U. S. 361, Scott, 826) was a neutral ship captured during the Spanish-American war for breach of the blockade of Guantanamo, established by the American naval forces. She had been chartered by a Spanish subject for the purpose of proceeding to Guantanamo or other Cuban ports for the purpose of taking away refugees. She was sailing at the time of capture under an enemy license. The evidence showed that while a public blockade of the port had never been proclaimed by the President of the United States, the charterer actually knew that the port was under blockade and that such blockade was efficient.

The court held that during the term of the charter, the *Adula* "was to a certain extent *pro hac vice*, a Spanish vessel, and a notice to Solis of the existence of the blockade was a notice to the vessel. *The Ranger*, 6 C. Rob. 126; *The Yonge Emilia*, 3 C. Rob. 52; *The Napoleon*, Blatch. Prize Cases, 296. The fact of her sailing under a Spanish passport—in fact, an enemy's license—is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The India*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440; *The Ariadne*, 2 Wheat. 143. This passport gave the *Adula* authority to enter the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured."

Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.—*Article 15, Declaration of London, 1909.*

"A vessel has left a neutral port subsequently to the notification of the blockade made to the powers to which the port belongs. Was this notification made in sufficient time; that is to say, so as to reach the port in question, where it had to be published by the port authorities? That is a question of fact to be examined. If it is settled affirmatively, it is natural to suppose that the vessel was aware of the blockade at the time of her departure. This presumption is not, however, absolute, and the right to adduce proof to the contrary is reserved. It is for the incriminated vessel to furnish it by showing that circumstances existed which explain her ignorance."

General report of drafting committee to London Naval Conference.

"Article 42. Ignorance of the blockade is permissible when the time which has elapsed since the declaration of the blockade is too short for the vessel which has already begun its voyage and has attempted to enter the blockaded port, to know of the blockade.

Institute (1882), p. 53.

In the case of a blockade regularly notified, "the act of sailing for the blockaded place, with an intent to evade it, or to enter contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked or actually raised;" while in the case of a blockade not so regularly notified—a blockade *de facto*—"the ignorance of the party as to its continuance may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination."

Kent, vol. 1, p. 153.

"Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the blockade, whether it is continued or is relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party, after sufficient time has elapsed to receive the declaration at the port whence the vessel sails. But where the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case, the party has a right to make a fair

inquiry whether the blockade be determined or not, and consequently cannot be involved in the penalties affixed to a violation of it, unless, upon such inquiry, he receives notice of the existence of the blockade."

Wheaton, p. 676.

"If * * * a vessel sails to a blockaded port at a time clearly later than that at which the general notification is matter of public knowledge, no special notification is required before seizure."

Hall, p. 722.

This presumption "is not absolute. Proof of ignorance may be given, and the prize court must decide whether it is conclusive."

Lawrence, p. 691.

"The existence of a blockade has always been presumed to be notorious to vessels within the blockaded ports, but it has been a question of fact whether it was notorious to other vessels. And knowledge of the existence of a blockade has always been presumed on the part of a vessel in case sufficient time had elapsed after the home State of the vessel had received diplomatic notification of the blockade, so that it could inform thereof all vessels sailing under its flag, whether or no they had actually received, or taken notice of, the information."

Oppenheim, vol. 2, p. 467.

"The neutral power which has received notification of a blockade is bound and presumed to publish the information throughout its dominions, and the announcement of a blockade by a belligerent power may be the subject of notoriety."

Westlake, vol. 2, p. 269.

"ART. 118. The Master of a Vessel will be presumed to have received Notice of a Blockade if a Notification of its existence has been made to the proper Authorities of the State to which the Vessel belongs,[1] and sufficient time has elapsed for such Authorities to communicate the Notification to the subjects of their State,[2] whether or no they have in fact communicated it."[3]

Naval Prize Law, Holland.

"ART. 41. Should it appear from the papers of a vessel, or otherwise, that the vessel had sailed for the blockaded port after the fact of the blockade had been communicated to the country of her port of departure, or after it had been commonly known at that port, she is liable to capture and detention as a prize. Due regard must be had in this matter to any treaties stipulating otherwise."

United States Naval Code, 1900.

"ART. 26. In the following cases the master of a ship shall be held to have received presumptive notice of the blockade:

"1. When the master of a ship must be presumed to have received notice of the blockade owing to notice of its establishment having

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"[1] *Neptunus*, 2 C. Rob. 111."
"[2] *Jonge Petronella*, 2 C. Rob. 131. *Calypso*, 2 C. Rob. 298. *Adelaide*, 3 C. Rob. 281."
"[3] *Neptunus*, 2 C. Rob. 110. *Spes and Irene*, 5 C. Rob. 76."

been given to the proper authorities of the country to which the ship belongs, and a sufficient interval having elapsed for its notification by the said authorities to the inhabitants of that country whether such notification was actually made or not.

"2. When the fact of the blockade has been published generally, and the master of a ship must therefore be presumed to have received notice of the blockade."

Japanese Regulations, 1904.

"76. Knowledge of the blockade is, in the absence of proof to the contrary, presumed, when the ship has left a neutral port subsequently to the notification, if in good time, of the blockade to the Power to which the port belongs."

French Naval Regulations, 1912.

Article 15 of Declaration of London, 1909, substantially appears as Art. 96 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"Should it appear from a vessel's clearance that she sailed after notice of blockade had been communicated to the country of her port of departure, or after the fact of blockade had, by a fair assumption, become commonly known at that port, she should be sent in as a prize. There are, however, treaty exceptions to this rule, and these exceptions should be strictly observed."

Instructions to United States Blockading Vessels, Navy Department, General Orders, No. 492, June 20, 1898. (For. Rel. 1898, 780.)

In the case of the *Betsy* (1799) (1 C. Rob. 332), an American vessel sailed from the United States for Amsterdam, which port the owners of the vessel knew was blockaded at the time of sailing. The court said:—

"The distance of the United States from the blockaded ports requires that the court should relax the rule as to notice of the blockade. It may fairly be considered that the owners of the ship expected that the blockade of Amsterdam would have ceased in the two months' time that it would take for the vessel to cross the ocean; that there was no real intention to break the blockade; otherwise the instructions would not have been so open.

"If the rule as to Europe was rigidly applied, the effect of the blockade would last two months longer in the United States than in Europe. A vessel should inquire as to existence of blockade, not from the blockading squadron, but at intervening ports on the way."

In the *Neptunus* (1799) (2 C. Rob. 110), Sir William Scott said: "The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it. It is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it."

In the case of The *Herald* (1865) (3 Wall. 768), a neutral vessel arrived in Boston on May 20, 1861. A blockade of Southern ports

had been announced in the proclamation of the President of April 27, 1861, and on April 30, 1861, the naval officer of the Squadron off Virginia proclaimed an "efficient" blockade of the coast of Virginia and North Carolina. The *Herald* was chartered on May 24th for a voyage from Boston to Beaufort, N. C. and thence to Liverpool. She cleared from Boston for Turk's Island, the master testifying that he intended, "in case I found Beaufort blockaded, to go to Turk's Island." Arriving off Beaufort on June 9, she lay off shore and went in the following morning where she took on board cargo. She sailed for Liverpool on July 14 and was captured at sea about 145 miles off Beaufort. The master claimed that until the capture he neither saw nor "heard of any blockade or blockading vessel."

The court held the *Herald* to be good prize, saying: "It is a matter of history that the notification as well as the proclamation, became at once well known throughout the country. It is impossible to believe that the master * * * on the 22d May, could have been ignorant of facts so notorious."

HOW NOTICE OF BLOCKADE GIVEN TO VESSEL INNOCENTLY APPROACHING BLOCKADED PORT—EFFECT OF LACK OF DECLARATION, OR FAULTY DECLARATION, TO LOCAL AUTHORITIES.

If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and the geographical position of the vessel at the time.

If, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.—*Article 16, Declaration of London, 1909.*

"A vessel is supposed to be approaching a blockaded port without its being possible to tell whether she knows or is presumed to know of the existence of the blockade; no notification in the sense of article 11 has reached her. In that case a special notification is necessary in order that the vessel may be duly informed of the fact of the blockade. This notification is made to the vessel herself by an officer of one of the war ships of the blockading force, and is entered on the vessel's log book. It may be made to the vessels of a convoyed fleet by a neutral war ship through the commander of the convoy, who acknowledges receipt of it and takes the necessary measures to have the notification entered on the log book of each vessel. The entry notes the time and place where it is made, and the names of the blockaded places. The vessel is prevented from passing, and the blockade is thus made binding for her, though not previously notified; this adverb is therefore omitted in article 8. It can not be admitted that a merchant vessel should claim to disregard a real blockade, and to break it for the sole reason that she was not personally aware of it. But, though she may be prevented from passing, she may only be captured when she tries to break blockade after receiving the notification. This special notification is seen to play a very small part, and must not be confused with the special notification absolutely insisted on by the practice of certain navies.

"What has just been said refers to the vessel coming in. The vessel leaving the blockaded port must also be considered. If a regular notification of the blockade has been made to the local authorities (art. 11 (2)), the position is simple: the vessel is, or is presumed to

be, aware of the blockade, and is therefore liable to capture in case she has not kept to the period for leaving allowed by the blockading power. But it may happen that no declaration of blockade has been notified to the local authorities, or that that declaration has contained no mention of the period allowed for leaving, in spite of the rule prescribed by article 9 (3). The sanction of the blockading power's offense is that the vessel must be allowed to go free. It is a strong sanction, which corresponds exactly with the nature of the offense committed, and will be the best means of preventing its commission.

"It is needless to say that this provision only concerns vessels to which the period allowed for leaving would have been of use—that is to say, neutral vessels which were in the port at the time when the blockade was established; it has nothing to do with vessels which are in the port after having broken blockade.

"The commander of the blockading squadron may always repair his omission or mistake, make a notification of the blockade to the local authorities, or complete that which he has already made.

"As is seen from these explanations, the most ordinary case is assumed—that in which the absence of notification implies negligence on the part of the commander of the blockading forces. The situation is clearly altogether changed if the commander has done all in his power to make the notification, but has been prevented from doing so by lack of good will on the part of the local authorities, who have intercepted all communications from outside. In that case he can not be forced to let pass vessels which wish to leave, and which, in the absence of the prescribed notification and of presumptive knowledge of the blockade, are in a position similar to that contemplated in article 16, paragraph 1."

General report of drafting committee to London Naval Conference.

"ART. XVIII. Considering the remoteness of the respective countries of the two high contracting parties, and the uncertainty resulting therefrom with respect to the various events which may take place, it is agreed that a merchant-vessel belonging to either of them, which may be bound to a port supposed at the time of its departure to be blockaded, shall not, however, be captured or condemned for having attempted a first time to enter said port, unless it can be proved that said vessel could and ought to have learned, during its voyage, that the blockade of the place in question still continued. But all vessels which, after having been warned off once shall, during the same voyage, attempt a second time to enter the same blockaded port, during the continuance of said blockade, shall then subject themselves to be detained and condemned."

Treaty between United States and Sweden and Norway, 1827. Treaties, &c., of United States, Malloy, vol. 2, p. 1754.

"ART. XIX. And whereas it frequently happens that vessels sail for a port or a place belonging to an enemy, without knowing that the same is besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband, be confiscated, unless, after warning of such blockade or investment from any officer commanding a vessel of the blockading forces, she shall again attempt to enter; but she shall be permitted

to go to any other port or place she shall think proper. Nor shall any vessel of either that may have entered into such port before the same was actually beseiged, blockaded or invested by the other, be restrained from quitting such place with her cargo, nor if found therein after the reduction and surrender shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof. And if any vessel having thus entered the port before the blockade took place, shall take on board a cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded and discharge the said cargo, and if after receiving the said warning the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port after being warned off by the blockading forces."

Treaty of 1828, United States and Brazil. Treaties, &c., of United States, Malloy, vol. 1, p. 139. (This treaty "only for articles relating to commerce and navigation" was terminated December 12, 1841.)

"ART. XVI. Considering the remoteness of the respective countries of the two high contracting parties, and the uncertainty resulting therefrom with respect to the various events which may take place, it is agreed that a merchant vessel belonging to either of them which may be bound to a port supposed at the time of its departure to be blockaded, shall not, however, be captured or condemned for having attempted a first time to enter said port, unless it can be proved that said vessel could and ought to have learned during its voyage that the blockade of the place in question still continued. But all vessels which, after having been warned off once, shall during the same voyage attempt a second time to enter the same blockaded port, during the continuance of said blockade, shall then subject themselves to be detained and condemned."

Treaty between United States and Greece, 1837. Treaties, &c., of the United States, Malloy, vol. 1. p. 853.

"ART. XX. And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is besieged or blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband, be confiscated unless, after warning of such blockade or investment from the commanding officer of the blockading forces, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel that may have entered into such port before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting that place with her cargo; nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof."

Treaty between United States and Columbia, 1846. Treaties, &c., of United States, Malloy, vol. 1, p. 308.

"ART. XX. And whereas it frequently happens that vessels sail for a port or places belonging to an enemy without knowing that the same is besieged, blockaded, or invested, it is agreed that every ves-

sel so circumstanced may be turned away from such port or place, but shall not be detained; nor shall any part of her cargo, if not contraband, be confiscated, unless, after warning of such blockade or investment from any officer commanding a vessel of the blockading forces, they shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel of either that may have entered into such port before the same was actually besieged, blockaded or invested by the other, be restrained from quitting such place with her cargo; nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof."

Treaty of 1858. United States and Bolivia. Treaties, &c., of United States, Malloy, vol. 1, p. 120.

"ART. XIV. And whereas it frequently happens that vessels sail for a port or a place belonging to an enemy without knowing that the same is besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband of war, be confiscated, unless, after a warning of such blockade or investment from an officer commanding a vessel of the blockading forces, by an endorsement of such officer on the papers of the vessel, mentioning the date and the latitude and longitude where such endorsement was made, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper. Nor shall any vessel of either, that may have entered into such a port before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof; and if any vessel, having thus entered any port before the blockade took place, shall take on board a cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded and discharge the said cargo, and if, after receiving the said warning, the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port after being warned off by the blockading forces."

Treaty between United States and Italy, 1871. Treaties, &c., of United States, Malloy, vol. 1, p. 973.

"Article 41. If it is evident that a merchant vessel approaching a blockaded port did not know of the existence of a blockade which has been declared and is effective, the officer in charge of the blockade shall notify the vessel of it, entering the notice in the vessel's papers on board the ship which has been so notified, making the entry at least in the certificate of nationality and in the log-book, noting the date of the notice, and shall invite the vessel to leave the blockaded port, and authorize it to continue its voyage to an unblockaded port."

Institute (1882), p. 53.

Effect of Disregard of Blockade—Notice.

If the master commenced his voyage "without a knowledge of the blockade, but he was afterward notified of its existence by a cruiser,

or officer of the blockading state, and he continue his voyage with the evident intention of entering the blockaded port, he is liable to condemnation."

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"Vessels though not ostensively destined to the blockaded port, cannot innocently place themselves in a situation that would enable them to violate the blockade at their pleasure. Even when they are bound, by their papers, to different ports, their suspicious approximation to that under blockade will subject them to condemnation. Were they permitted, on the pretense of an intention to proceed to another port, to approach so close to that blockaded as to be able to slip in without obstruction, whenever they choose, it would be impossible that any blockade could be long maintained. Hence, it is not unfair to hold, that the intention of the party, in such cases, to violate the blockade, is a necessary and absolute presumption; although the excuse of necessity, when established, is doubtless to be admitted. The proof, however, must be clear and satisfactory, to remove the inference of guilt."

* * * * * * *

"Any *attempt* to enter a blockaded port, after due information or warning, subjects the party to the penalty of the law; 'but, whether the mere *declarations* of the master, when detained and warned by a ship of the blockading force, of his *intention* to persist in the voyage, notwithstanding the warning, is to be considered as evidence of an actual attempt, justifying an immediate capture, is exceedingly doubtful.' The mere hasty expressions of the master, resulting from resentment and surprise, certainly ought not to produce the condemnation of property entrusted to his care. But where the declaration of the master is proved to be deliberate and is accompanied by such facts as induce the court to believe that he *really* intended to carry it into effect, Sir William Scott was of opinion that it supersedes the necessity of proving further facts, and it is of itself a sufficient ground of condemnation. Chief Justice Marshall, in enumerating several general acts that would be justly regarded as evidence of such an attempt, adds: 'possibly the obstinate determined declarations of the master, of his resolution to break the blockade, might bear the same interpretation.' The supreme court of Pennsylvania have clearly decided that the declarations of the master, however positive and unequivocal, are evidence merely of intention, which, unless followed by some voluntary act after his release, can never constitute the offense to which alone the penalty attaches. * * *

"Although the declarations of the master, during his detention, will not constitute in itself sufficient cause for condemnation, his subsequent conduct, either with or without such declarations, may determine the lawfulness of his capture. It is his duty, on being duly warned, to alter the course of his voyage, as soon as he is at liberty to resume it, and to depart at once from the vicinity of the blockaded port. 'He has no right to linger in its neighborhood, on the pretense of a deliberation as to the course he shall pursue, thus compelling the belligerent ship, either to leave him to enter the blockaded port without obstruction, or to wait for an indefinite time to watch his motions. He is bound to manifest, by his immediate acts, his determination to obey the warning he had received. Hence a very short delay, an interval probably of less than an hour, will enable the bel-

ligerent to determine whether the master is pursuing the course he is bound to observe, or whether the temporary detention may not lawfully be followed by a final capture. It is scarcely possible that a neutral ship, thus circumstanced, shall escape, otherwise than by an abandonment in good faith of the voyage, that the warning she had received has rendered illegal.' * * *

"If the master persist in his voyage to a blockaded port, in defiance of a sufficient and legal warning, no excuse is ever admitted for his conduct, and the ship and cargo are invariably condemned. 'His misconduct may, in no degree be imputable to his owners, yet their innocence affords no protection to their property. His acts may be in direct violation of their express instructions, may even amount to fraud or barratry; yet his owners will continue to be bound by their legal consequences, to the same extent, as if they had been performed under their previous sanction and authority. Indeed the rule, so far as relates to the ship, and the property of its owners, is universal, that they are concluded by the acts of the master. He is their agent, and the property they have entrusted to his care is, in all cases, responsible for his just observance of the duties of neutrality.'

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"There are a number of cases in which the egress of the neutral vessel, during a blockade, is justified or excused: *First*, If the ship is proved to have been in the blockaded port when the blockade was laid, she may retire in ballast, for such egress affords no aid to the commerce of the enemy, and has no tendency to defeat any legitimate purpose for which the blockade was established. *Second*, If the ingress was from physical necessity, arising from stress of weather, and the immediate need of water, or provisions, or repairs. *Third*, Where the entrance with a cargo was authorized by a *license*, such license is construed to authorize the return of the ship with a cargo. *Fourth*, Where a neutral ship, arriving at the entrance of a blockaded port, in ignorance of the blockade, is suffered to pass, there is an implied permission to enter, which fully protects her egress. But this implied permission does not, of necessary consequence, protect the cargo, for its owners may be guilty of a criminal violation of the blockade even where the ship is innocent. *Fifth*, A neutral ship, whose entry into the blockaded port was lawful, is permitted to return with her original cargo that has been found unsaleable, and reshipped during the blockade. *Sixth*, '*Another*, and a very equitable exception,' says Duer, 'is allowed in favor of a neutral ship that leaves the port in the just expectation of a war between her own country and that to which the blockaded port belongs. In this case, she is permitted to depart, even with a cargo purchased from the enemy during the blockade, if the purchase was made with the funds of neutral owners, and the investment and shipment were probably necessary to save the property, in the event of a war, from a seizure and confiscation by the enemy. But it is not the mere apprehension of a remote and possible danger that will entitle a neutral ship to this exemption. To save the vessel and cargo from condemnation, it must appear that there was a well-founded expectation of an immediate war, and, consequently, that the danger of the seizure and confiscation of the property was imminent and pressing.'"

Halleck, pp. 552, 556, 558, 559, 561.

The last paragraph of Art. 18 of the treaty of 1794 between Great Britain and the United States, the provisions of which were similar to previous treaties between Great Britain and the Baltic powers, provided "that whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter: but she shall be permitted to go to any other port or place she may think proper." Alleged violations of this treaty were brought to the attention of the British Government by the United States, and in 1804, Great Britain issued instructions "to the naval commanders and judges of the Vice-Admiralty Courts, not to consider any blockade of the French West India Islands as existing, unless in respect to particular ports which were actually invested; and then not to capture vessels bound to such ports, unless they should previously have been warned not to enter them. The stipulation in the treaty intended to be enforced by these instructions seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it. Neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the mere intention to enter a blockaded port, unconnected with any fact. In the above-cited cases, the fact of sailing was coupled with the intention, and the condemnation was thus founded upon a supposed actual breach of the blockade. Sailing for a blockaded port, knowing it to be blockaded, was there construed into an attempt to enter that port, and was, therefore, adjudged a breach of blockade from the departure of the vessel. But the fact of clearing out for a blockaded port is, in itself, innocent, unless it be accompanied with a knowledge of the blockade. The right to treat the vessel as an enemy is declared by Vattel, (liv. iii. sect. 177,) to be founded on the *attempt* to enter; and certainly this attempt must be made by a person knowing the fact. The import of the treaty, and of the instructions issued in pursuance of the treaty, is, that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. They gave her a right to inquire of the blockading squadron, if she had not previously received this warning from one capable of giving it, and consequently dispensed with her making that inquiry elsewhere. A neutral vessel might thus lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such a port would not constitute an attempt to break the blockade, unless she should be actually warned off."

Wheaton, pp. 678, 679.

With respect to the right of a vessel to leave a blockaded port, Dana in his Note 235 to Wheaton, p. 683, says: "It is a settled rule of law, that a vessel in a blockaded port has notice of a blockade as soon as it commences; and no evidence of her ignorance can be received."

Dana says that in the case of the *Franciska* (10 Moore's P. C., 59) it was held that: "Although the blockade be *de facto* only, the

neutral cannot claim a right to a warning by the blockading vessels on the spot, but is affected by any kind or means of knowledge which may be proved against him, directly or by presumptions, as, for instance, the notoriety of the blockade at his last port of departure."

Wheaton, Dana's Note 235, p. 682.

Where vessels sail before the formal notification of blockade is made by the belligerent power, or where they approach "a port closed by a merely *de facto* blockade, which has been instituted on the authority of the officer commanding the belligerent force in the neighboring seas, or which for some reason has not yet been the subject of a diplomatic notification" they are entitled to be notified of the existence of the blockade. "Knowledge of the fact cannot then be presumed, and vessels are consequently turned back with a like notice endorsed on their papers to that which is required under the French usage."

Hall, p. 722.

"If a blockade *de facto* be good in law without notification, and a wilful violation of a legal blockade be punishable with confiscation, propositions which are free from doubt, the mode in which knowledge has been acquired by the offender, if it be clearly proved, cannot be of importance."

The *Franciska*, on appeal, 10 Moore, 46. Quoted in Note 1, Hall, p. 722.

"Neutral vessels lying in a belligerent port at the moment when it is placed under blockade are subjected to special usages with respect to which there is no difference of opinion. It would be obviously unjust to shut up the unoffending neutral in a common prison with the belligerent; on the other hand, the object of a blockade being to cut off all trade from the closed port, the operation would be to a great extent nullified if vessels within the harbour at the inception of the blockade were allowed to come out with cargo shipped after its commencement. Hence, exit is allowed only under certain conditions, and it is necessary, if a vessel is to appear at the mouth of the port in a state according with these conditions, that she shall be informed beforehand of the fact that they have been imposed. A general notification is therefore sent to the authorities of the blockaded port, announcing the commencement of the blockade and specifying a time during which vessels may come out. It being certain that a notice affecting the narrow space of a particular port must of necessity become known to every person within it, the practice of most nations dispenses with further warning; and after a blockade has existed for a while, 'it is impossible for those within to be ignorant of the forcible suspension of their commerce,' so that, even without notice, warning to each ship is superfluous. But the French perhaps extend the privilege of special warning to vessels issuing from a blockaded port with cargo laden after establishment of the blockade.

"The period which is allowed for the exit of ships is usually fixed at fifteen days." This was the period allowed Denmark in 1948 and in 1864, by England and France in the Crimean War, by the United States in the Civil War, and by France in 1870. "During this" period "vessels may issue freely in ballast or with a cargo *bona fide*

bought and shipped before the commencement of the blockade." The period allowed vessels to depart from a blockaded port may, however, vary according to circumstances; thus in the French blockade of Buenos Ayres in 1838, vessels were allowed forty-two days to depart, this liberal time having been given because of the difficulties of navigating on the river. "When New Orleans was blockaded in 1861 the water on the bar of the Mississippi was unusually low, and the commander of the blockading squadron extended the permitted time in favor of vessels of deep draught."

Hall, 731–733.

"It would seem however that Prussia and Denmark allow ships to come out with cargo shipped after the commencement of the blockade."

Rev. de Droit Int. X, 212, 239. Quoted in Note 1, Hall, p. 732.

"In 1855 it was laid down that '*primâ facie* every vessel whatsoever, laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule.'"

The *Otto & Olaf*, Spinks, 259. Quoted in Hall, Note 2, p. 732.

For a list of special treaties providing for warning to vessels issuing with cargo after beginning of blockade, see Note 3, Hall, p. 732.

After notification in accordance with this article the vessel is "turned back, and only if she attempts a second time to pass is she captured for breach of blockade. If a convoyed fleet of neutral merchantmen approaches in ignorance, the commander of the convoying force is warned, and it is his duty to see that the notification is entered in the logbook of each of the ships under his escort. The system thus set forth was elaborated at the Naval Conference of 1908–1909, and is set forth in the Declaration of London of 1909, which is likely to become in the near future part of International Law, if indeed it has not attained that position already. It contrasts favorably with the complications of the old British system and the lax simplicity of the old French rule."

Lawrence, p. 691.

"There are a few cases of egress which, according to the hitherto prevailing practice of Great Britain and most other States, were not considered breaches of blockade outwards. Thus, a vessel that was in a blockaded port before the commencement of the blockade was allowed to sail from this port in ballast, as was also a vessel that had entered during a blockade either in ignorance of it or with the permission of the blockading squadron. Thus, further, a vessel the cargo of which was put on board before the commencement of the blockade was allowed to leave the port afterwards unhindered. Thus, again, a vessel obliged by absolute necessity to enter a blockaded port was afterwards allowed to leave it unhindered. And a vessel employed by the diplomatic envoy of a neutral State for the exclusive purpose of sending home from a blockaded port distressed seamen of his nationality was also allowed to pass unhindered."

Oppenheim, vol. 2, p. 473.

The proclamation of April 19, 1861, issued by the President of the United States, announcing a blockade of the Southern States recites that:

"If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize as may be deemed advisable."

12 Stat., 1258.

"Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer, who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to be set free; and should she again attempt to enter the same or any other blockaded port as to which she has had notice she is good prize. * * *"

Instructions to United States Blockading Vessels, Navy Department General Orders, No. 492, June 20, 1898. (For. Rel. 1898, 780.)

"ART. 127. If the Commander finds that the Master has not had Notice, either Actual or Constructive, of the Blockade, he should record a Warning upon the Log of the Vessel, and also upon the document which fixes her Nationality, and order her Master to turn back. * * *"

"ART. 128. If the Master, after receiving the Warning, does not turn back, but perseveres in his course, or persists in loitering about, the Commander should detain the Vessel."[1]

Naval Prize Law, Holland.

"ART. 40. Vessels appearing before a blockaded port, having sailed before notification, are entitled to special notification by a blockading vessel. They should be boarded by an officer, who should enter upon the ship's log or upon its papers, over his official signature, the name of the notifying vessel, a notice of the fact and extent of the blockade, and of the date and place of the visit. After this notice an attempt on the part of the vessel to violate the blockade makes her liable to capture."

United States Naval Code, 1900.

"66. * * * If the declaration omits to state the period for leaving port, a neutral ship has the right of free passage outward from a blockaded port, unless she has previously, with knowledge of the blockade, broken it by entering. The naval commander can supply any data lacking at any time by publishing and communicating a supplementary declaration to the local competent authorities."

German Prize Rules, 1909.

[1] "Apollo, 5 C. Rob. 286. Fitzsimmons *v.* Newport Insurance Co., 4 Cranch, 185."

"74. Should a neutral ship[1] approach a blockaded port without having knowledge of the existence of the blockade or when such knowledge can not be assumed, the declaration of blockade is to be communicated to him by an officer of one of the blockading ships. He must enter in the ships log book the notification, under the date and hour and the ship's position. Therewith the blockade is legally binding for that ship, so far as declaration and notification come into question.

"The notification to the commander of the convoy is binding on all the convoyed ships."

German Prize Rules, 1909.

"74. A violation of a blockade thus established results both from an attempt to enter the blockaded place and from an attempt to leave it after the notification of the blockade, unless, in the latter case, there is a period fixed and expressly mentioned in the declaration of blockade sufficient to protect navigation and commerce carried on in good faith."

French Naval Regulations, 1912.

"77. If a vessel which approaches a blockaded port does not know or can not be presumed to know of the blockade, the notification must be made to the vessel itself by an officer of one of the blockading force. This notification must be entered in the vessel's log-book, with entry of the day and hour as also of the geographical position of the vessel at the time."

French Naval Regulations, 1912.

"80. Every ship which, after having received regular notice, does not in good faith retire and is surprised hovering about the blockaded coast, within the radius of action of the blockading force, is to be suspected of fraud and may be captured."

French Naval Regulations, 1912.

Article 16 of the Declaration of London, 1909, substantially appears as Art. 97 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"In the case of a vessel which had run the blockade of Vera Cruz, in Mexico, by the United States, without interference by the blockading squadron, and which was captured on coming out, it was claimed that the capture was unlawful because no previous warning of the blockade was given, by an entry on the papers of the vessel or other mode of actual notice. As it appeared, however, that the master was fully aware from the commencement of the voyage of the existence of the blockade, it was held that no further notice was necessary."

Moore's Digest, vol. 7, pp. 823, 824.

"The provision in the President's proclamation of the 19th of April, 1861, for *warning* vessels which approached the blockaded ports with a view to entering, did not protect a vessel that sailed for

[1] "If a hostile ship is captured under these circumstances, there is no breach of blockade; the neutral part of the cargo is therefore not confiscated."

a blockaded port with knowledge of the blockade. The *Hiawatha*, 2 Black, 677; The *Admiral*, 3 Wall. 603."

Moore's Digest, vol. 7, p. 821.

In a letter, dated March 20, 1816, from the American Secretary of State to the Spanish Minister, the statement is made "'* * * that a vessel entering the [blockaded] port ought not to be seized, except in returning to it after being warned off by the blockading squadron stationed near it.'"

Moore's Digest, vol. 7, p. 789.

"The *Jeune Nelly*, a French vessel, ran the blockade of Vera Cruz, Mexico, by the United States forces without interference by the blockading squadron. On coming out, however, she was captured by the U. S. S. *Hunter*, but, being almost immediately afterwards wrecked, was not brought in for adjudication. The French Government presented a claim for damages on the ground that, as the vessel was permitted to enter the port, she was exempt from capture on going out unless previously warned by entry on her papers or other mode of actual notice. The United States declined to admit this contention, and maintained that nothing short of an intentional assent (of which there was no evidence) on the part of the blockading force to the entrance of the vessel would have sufficed to give her immunity from the operation of the blockade. 'When the blockade,' said the Department of State, 'is actually maintained by a sufficient force, and when the captured vessel, with full knowledge of its existence, and without the consent of the blockading squadron, enters the port, the question how far the entry might have been prevented by greater activity or different measures on the part of the blockaders, is not material and is never examined. The vessel being thus in port, in breach of the blockade, was of course liable to capture in attempting to pass out.' Mr. Hunter, Act. Sec. of State, to M. de Sartiges, French min., July 29, 1852, MS. Notes to French Leg. VI. 188."

Moore's Digest, vol. 7, p. 837.

"'The safest rule, in regard to the rights of both belligerents and neutrals involved in blockade, is believed to be contained in the 18th article of the treaty between the United States and Great Britain of the 19th of November, 1794, in the following words:

"'"And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after the notice, she shall again attempt to enter, *but she shall be permitted to go to any other port or place she may think proper.*"

"'A similar article is contained in many other treaties between the United States and foreign powers.' Mr. Seward, Sec. of State, to Lord Lyons, British min., Mar. 24, 1862, MS. Notes to Gr. Brit. IX. 142."

Moore's Digest, vol. 7, p. 824.

In October 1888, the *Haytian Republic* sailed from New York to certain Haytian ports. After calling at several ports she sailed on the 19th from Jacmel to St. Marc. A blockade of St. Marc had been ordered on October 15th and published in the official paper on the 18th. News thereof, however, was not known in Jacmel and the steamer had no notification thereof before she sailed on the 19th. She reached St. Marc on the 20th, entered and was captured for breach of blockade while leaving. In his instructions, dated November 28, 1888, demanding her release, sent by the Secretary of State to the American minister to Hayti, Mr. Bayard says:—

"'The treaty between the United States and Hayti of November 3, 1864, contains the following provisions:

"'"Article XVIII. And whereas it frequently happens that vessels sail for a port or place belonging to an enemy without knowing that the same is either besieged, blockaded, or invested, it is hereby agreed by the high contracting parties that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor any part of her cargo, if not contraband, be confiscated, unless, after notice of such blockade or investment, she shall again attempt to enter; but she shall be permitted to go to any other port or place she shall think proper, provided the same be not blockaded, besieged, or invested. Nor shall any vessel of either of the parties that may have entered into such port or place before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor, if found therein after the reduction and surrender of such place, shall such vessel or her cargo be liable to confiscation, but they shall be restored to the owners thereof.'

"'From the above stipulations it is manifest that so far as the proceedings against the *Haytian Republic* rest upon a charge of attempting to run a blockade, they were in clear violation of the express terms of the treaty, and wholly improper and inadmissible.'"

Moore's Digest, vol. 7, pp. 826, 827.

In the *Vrow Judith* (1799) (1 C. Rob. 150), it is said that: "It is certainly necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner, by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice. But it may commence also de facto, by a blockading force giving notice on the spot to those who come from a distance, and who may therefore be ignorant of the fact. Vessels going in, are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But I take it to be otherwise with vessels coming out of the port which is the object of blockade; there no notice is necessary, after the blockade has existed de facto for any length of time; the continued fact is itself sufficient notice. * * * The notoriety of the thing supersedes the necessity of particular notice to each ship."

In the case of the *Columbia* (1799) (1 C. Rob. 154), an American merchantman captured for breach of blockade of Amsterdam, it was contended "that by the American treaty" of 1794, "there must be a previous warning." In regard to this contention Sir William

Scott said: "Certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can effect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel appear to have been sufficiently informed of this blockade; and therefore, they are not in the situation which the treaty supposes."

With respect to a *de facto* blockade, it is said in the *Neptunus* (1799) (2 C. Rob. 110, Scott, 796) that "no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse, for sailing on a doubtful and provisional destination."

In the case of *The Spes* and *The Irene* (1804) (5 C. Rob. 77), two vessels were captured for breach of the blockade of the Elbe. It was claimed on the part of the vessels that while they had notice of the blockade, they also had notice of its probable discontinuance, and that they proposed to approach the mouth of the river to ascertain whether the blockade was in fact in force. If in force they proposed to proceed to another port.

Sir William Scott, in delivering the judgment of the court holding that the vessels were good prize, said: "The letters of the owner inform the masters that the blockade would probably be at an end before they arrived, and direct them to proceed for the Elbe. Are these the orders which owners ought to have given? I think not. The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river and say, if you do not meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere. Who does not at once perceive the frauds to which such a rule would be introductory. The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry. It is contended, however, on this point, that the parties are entitled to the same equity as was allowed to American vessels during the last war. But what was that? That ships sailing from America, before the knowledge of the blockade had reached America, should be entitled to a notice, even at the blockaded port; and that ships sailing afterwards, might sail on a contingent destination, even to that port, with the purpose of calling at some British port, or at some neutral port for information; and that they should be allowed the benefit of such a contingent destination to be ascertained and rendered definite, by the information which they should receive in Europe. But in no case was it held that they might sail to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particular parties are innocent in their intention, it is still a measure of necessary caution, and of preventive legal policy, to hold the rule general against the liberty of inquiring at the very mouth of the blockaded port, which would amount in practice to a universal license to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere."

The *Apollo* (1804) (5 C. Rob. 286) was captured for breach of blockade of Dieppe. She had sailed for this in ignorance of the blockade but was duly warned while en route. Instead of leaving the neighborhood she loitered around until her capture.

In holding her to be a good prize, Sir William Scott said that the first duty of a master under such circumstances, is to leave: "that neighborhood is at all events to be avoided. He is bound, on the first notice, to take himself out of an equivocal situation, and if he obstinately refuses and neglects so to do, this court will hold * * * that such a conduct will amount to a breach of the blockade, and subject the vessel to condemnation."

The case of Fitzsimmons *v.* Newport Insurance Company (1808) (4 Cranch 183) involved a construction of article 18 of the treaty of 1794 between the United States and Great Britain. Chief Justice Marshall said that the words of this article "strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made. It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for some other port, or possibly, obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter, and 'unless, after notice, she shall again *attempt* to enter,' the two nations expressly stipulate 'that she shall not be detained, nor her cargo, if not contraband, be confiscated.' It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with intention to constitute the breach of a blockade."

Chief Justice Marshall in his opinion in the case of Olivera *v.* Union Ins. Co. (1818) (3 Wheat. 183) says:

"That a belligerent may lawfully blockade the port of his enemy is admitted. But it is also admitted that this blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage by the blockading squadron, the restraint is unlawful. The *St. Francis de Assise* was so restrained, and her case is within the policy.

"It has been contended that it was the duty of the neutral master to show to the visiting officer of the belligerent squadron his right of egress, by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board before the institution of the blockade.

"This is admitted, and it is believed that the bill of exceptions shows satisfactorily that these facts were proved to the visiting officer. It is stated that the vessel and cargo were regularly documented; that the papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage, before the institution of the blockade."

Moore's Digest, vol. 7, p. 849.

In the case of the *Franciska* (1855) (10 Moore P. C. 37, Scott, 804) it was "contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

"To this proposition their lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt,—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

"The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the court below in this case, and the language of Lord Stowell in The *Adelaide* reported in the note to The *Neptunus*, 2 Rob. 111, and The *Hurtig Hane*, 3 Rob. 324, are conclusive upon this point.

"But while their lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. 'Any communication which brings it to the knowledge of the party,' to use the language of Lord Stowell in The *Rolla*, 6 Rob. 367, 'in a way which could leave no doubt in his mind as to the authenticity of the information.'

"Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding. The notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification, or of a particular warning, would have been legal and effectual."

In the case of the *Hiawatha* and others (1861) (Blatch. P. C. 1, 13) the court said: "It is strenuously insisted that, under the proclamation of the President, a vessel is not subject to capture for violation of a blockade unless there has been a previous warning indorsed on her register by a commander of a blockading vessel at the port whose blockade she attempts to violate, and she shall afterwards attempt to enter or leave the same blockaded port. In my opinion, the provision in the President's proclamation of April 19, 1861, referred to on the argument, is not to be construed as a condition absolute, governing all instances of an effort by neutrals to break a blockade, but

imports that the vessel so to be warned must have been arrested in innocently attempting to do the forbidden act, and will not apply in cases where a vessel has, at the time of capture, perfected the prohibited attempt by effecting an entrance into or escape from a blockaded port undetected until the unlawful purpose has been accomplished. The universality and justness of the rule of the law of nations, that the breach of a blockade, with knowledge or notice of its existence, subjects the property so employed to confiscation, is stated by Lord Stowell, and commended with great force and emphasis in the case of The *Columbia*, an American vessel, (1 Ch. Rob., 154.) He says that, 'among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all books of law, and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge.' (1 Kent's Comm., 144; Halleck's Int. Law, ch. 20, secs. 16 to 24; 2 Wildman's Int. Law, ch. 4.) The common rule of the law of nations will, accordingly, be deemed to prevail, when not expressly abrogated by treaty or edict of the power seeking to enforce it."

This case was affirmed by the Supreme Court. See the Prize Cases, 2 Black, 635.

In the case of the *Forest King* (1861) (Blatch. 45, 48) the court said: "The master testifies that he approached Pensacola to ascertain the fact whether a port could be entered in that vicinity free from blockade, and that he, in making that attempt, received the first formal notice of the blockade of that section of the coast and up to the capes of the Delaware. I consider that his conduct in making the inquiry or search he did was blameless."

In the case of the *Delta* (1862) (Blatch. P. C. 133) the court discussed the question of whether a vessel, knowing a port is blockaded, may approach such port "even for the *bona fide* purpose of inquiry." It is said that "it is conceded—and if not, it is a part of the history of the case, and sworn to by all the witnesses—that all concerned in the adventure had knowledge, full and complete, of the actual effective blockade of the port of Galveston, at and prior to the commencement of the voyage in which the vessel was captured.

"It is well established by repeated decisions of Sir William Scott, the great master of British prize law, that a neutral trader cannot, with knowledge of a blockade, lawfully go to the station of a blockading force under the pretence of obtaining information as to its continuance. The inquiry must be made elsewhere, not there. 'The merchant,' says the learned judge, 'is not to send his vessel to the mouth of the river, and say, "If you don't meet a blockading force, enter; if you do, ask a warning and proceed elsewhere." Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that after knowledge of the existing blockade, you are not to go to the very station of the blockade upon pretence of inquiry.' (The *Spes* and The *Irene*, 5 Ch. Rob., 76; The *Betsey*, 1 Ch. Rob., 334; The *Neptunus*, 2 Ch. Rob., 110; The *Little William*, 1 Acton, 141, 161.)

"The reason and necessity of the rule, as laid down by Sir William Scott, is too obvious to require argument in its support. Were it

once relaxed, so as to allow the approach of neutral traders to the mouth of a blockaded port for the purpose of inquiry, the blockade of the ports of the insurgent States could not be made effective by the combined naval forces of all nations. Such a relaxation would operate as a universal license to the merchant vessels of the world to attempt to enter a blockaded port, for a failure to do so would be attended with no hazard.

"The soundness of this principle has not been called in question by any decision of the courts of this country, and its wisdom will probably be approved so long as a belligerent blockade is recognized in international law as a legitimate and efficient method of prosecuting a public war."

The *Empress* (1863) (Blatch. 659) was a neutral-owned vessel captured for breach of blockade of New Orleans. She had sailed from Rio de Janeiro with knowledge of the blockade and with instructions to proceed to New Orleans; "should the port be blockaded, you will be warned off and you will then proceed to New York." She sailed directly to New Orleans, eluded the blockading squadron and was captured while aground in the mouth of the Mississippi.

The lower court condemned her as good prize. (Blatch. 175.) On appeal to the Circuit Court she was released, the higher court saying: "The only question in the case is, whether or not the vessel and cargo are subject to condemnation for attempting to break the blockade of the port of New Orleans. Upon a perusal of the testimony *in preparatorio* and the documentary proofs, I am satisfied that there was no such intent on the part of the master or of the owners of the cargo; but that, on the contrary, their purpose was to ascertain, at the mouth of the Mississippi river, by personal inquiry, whether or not the port of New Orleans was actually blockaded. This was, I think, the *bona fide* intention of the parties. There was no disguise of the purpose, as it was avowed in the charter party, and in the written instructions from the owners of the cargo, and repeatedly by the master himself; and the only question is, whether the master was justified, under the circumstances disclosed in the case, in making such inquiry.

"It is quite apparent that these parties adopted that construction of the proclamation of the President announcing an intent to set on foot a blockade of the southern ports, which is indicated by its terms—that a vessel sailing for a port in a state of blockade would be entitled to a warning from one of the blockading vessels before a forfeiture would be enforced; and that, acting upon such construction, and the consequent directions found in the charter party, and the instructions from the charterers, the master persevered in the purpose of making the inquiry, although, at the same time, he had good reason for the belief that the port was in a state of actual blockade. This interpretation of the proclamation was overruled by a majority of the Supreme Court in the case of the *Hiawatha*, and must be regarded, therefore, as affording no justification to either vessel or cargo.

"But, although the terms of the proclamation furnish no justification for the act, yet, I think they are entitled to consideration when we are inquiring into the intent with which the master was sailing for the blockaded port. These terms may have honestly misled him:

and the fact that the vessel was found at a place which would, under other circumstances, be suspicious, may, in view of those terms, be consistent with her entire innocence.

"There was no official notice of the blockade of the port of New Orleans given by this government to the British or the Brazilian government. There is no evidence in this case at what time it was established. The case must stand upon a blockade *de facto*, as it respects foreign neutral traders at the belligerent port. No doubt a general notoriety prevailed at Rio Janeiro, at the time of the sailing of the vessel from that place, that the mouths of the Mississippi were blockaded; and the master of the vessel was advised, in the course of the voyage, by a vessel which he hailed, that he would be stopped at the Balize. There are, undoubtedly, cases which hold, as a general rule, that, even in the case of a blockade de facto, the inquiry must not be made at the blockaded port, if it be reasonably practicable to ascertain the fact by inquiry at a neutral port. There are, however, exceptions to this rule, and, under all the circumstances and proofs in the case, I am inclined to think that the present is one of them."

The case of the *Cheshire* (1865) (3 Wall. 231) involved the capture and condemnation of a vessel and cargo owned by a firm doing business in both enemy and neutral territory. The vessel sailed from a neutral port and was captured off a blockaded port for breach of blockade. Before sailing the master was given written instructions "to call off Savannah *merely for the purpose of inquiry*, but on *no account whatever* to attempt to enter a blockaded port." In case the blockade of Savannah was not raised the vessel was to proceed to a neutral port and await instructions. At the time of sailing it was known that Savannah was under blockade. None of the ship's papers contained any intimation of a purpose to enter Savannah.

In sustaining the condemnation, the court said that the evidence establishes "the fact that the ship was attempting to break the blockade when captured. She was loaded for Savannah; her cargo was intended for the branch-house of the shippers; she sailed directly for that port; the owners and officers of the ship were informed of the existence of the blockade before leaving Liverpool; and there was no act of our government, nor any act of the British government, nor had any event occurred in the progress of the war, from which any inference could be drawn that the blockade had ceased. The instructions to call off Savannah merely for the purpose of inquiry, and to proceed thence to Nassau upon ascertaining that the blockade was in force, have, under these circumstances, the appearance of a device to cover up a settled purpose to elude the blockade. They create a strong impression to that effect, and this impression is strengthened by an examination of the ship's papers. These papers contain no intimation of an intention to enter the port of Savannah upon any contingency. They show the destination of the ship to be either Nassau or Halifax; they indicate no contingent intention of going anywhere else. This concealment of the truth is itself a circumstance calculated to awaken strong suspicion as to the real designs of the ship; it is, in fact, *prima facie* evidence of fraudulent intention."

The Supreme Court of the United States in the case of The *Admiral* (1865) (3 Wall., 603), said that the "settled rule as established by a majority of this court is that a vessel which has a full knowledge of the existence of a blockade is liable to capture if she attempts to enter the blockaded port in violation of the blockade regulations, and that it is no defence against an arrest made under such circumstances that the vessel arrested had not been previously warned of the blockade, nor that such previous warning had not been indorsed on her register."

In the case of the *Adula* (1900) (176 U. S., 361, Scott, 826) it was contended by the counsel for the vessel that "the adhesion of" the United States, "at the beginning of the war, to the declaration of Paris abolishing privateering" made it necessary for a vessel to be notified by a blockading vessel before she could be captured for breach of blockade. In regard to this contention the court said: "This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, Vol. 1, p. 375, in which it is said that by the modern law, in consequence of the declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that 'the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it.'

"We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We cannot change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.

"We have not overlooked in this connection the provision contained in Art. 18 of Jay's treaty of 1794, to the effect that 'whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained nor her cargo, if not contraband, confiscated, unless after notice she shall again attempt to enter.' Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185. Waiving the question whether this clause of Jay's treaty was abrogated by the war of 1812, and accepting it as a correct exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded, or invested.

The whole case against the *Adula* depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the Maryland Ins. Co. *v.* Woods, 6 Cranch, 29, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British Government, and communicated to our government, 'not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them.' This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies."

Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.—*Article 17, Declaration of London, 1909.*

"The other condition of the liability of a vessel to capture is that she should be found within the area of operations of the warships detailed to make the blockade effective; it is not enough that she should be on her way to the blockaded port.

"As for what constitutes the area of operations, an explanation has been given which has been universally accepted, and is quoted here as furnishing the best commentary on the rule laid down by article 17:

'When a government decides to undertake blockading operations against some part of the enemy coast it details a certain number of warships to take part in the blockade and intrusts the command to an officer whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places and instructs each ship as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched taken together, and so organized as to make the blockade effective, form the area of operations of the blockading naval force.

'The area of operations so constituted is intimately connected with the effectiveness of the blockade and also with the number of ships employed on it.

'Cases may occur in which a single ship will be enough to keep a blockade effective—for instance, at the entrance of a port or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations become wider and extends farther from the coast. It may therefore vary with circumstances and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

'It does not seem possible to fix the limits of the area of operations in definite figures any more than to fix beforehand and definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might perhaps be done at the time of making the declaration.

'It is clear that a blockade will not be established in the same way on a defenseless coast as on one possessing all modern means of defense. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force, which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

'The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations joined with that of effectiveness, as we have tried to define it—that is to say, including the zone of operations of the blockading forces—allows the belligerent effectively to exercise the right of blockade, which he admittedly possesses, and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly incur by approaching points to which access is forbidden by the belligerent.'"

General report of drafting committee to London Naval Conference.

"22. A blockading fleet will, in general, station itself at such a distance from the blockaded coast as will render it reasonably secure from attack from that coast. This distance is likely, under modern conditions of war, to be considerable, and the blockading ships would probably be disposed in two or more lines or groups. The French Government have recently defined the area within which vessels may be seized for breach of blockade, to be the '*rayon d'action* of the vessels charged with the duty of insuring the effectiveness of the blockade.' If the *rayon d'action* may be defined as the area of operation of the blockading force, His Majesty's Government would be disposed to accept a rule to the above effect, as fairly representing the actual practice of both the rival systems, and therefore capable of being described as of general application. Such a rule would safeguard all belligerent rights in regard to blockade which Great Britain has been able practically to assert in former wars, whilst it would at the same time reassure neutrals that their ships would not be captured until actually approaching the waters in which the blockade was effectively maintained."

Instructions, December 1, 1908, from Sir Edward Grey to Lord Desart, British delegate to the London Conference. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 26.

"7. * * * The vexed question of the distance from the blockaded coast at which vessels attempting to break blockade may be captured, has been solved, as suggested in paragraph 22 of our instructions, by restricting the geographical limits within which capture is authorized to the area of operations of the blockading forces. As indicated in paragraph 21 of those instructions, this solution is

quite in harmony with the facts of the various reported decisions of our prize courts."

Report, March 1, 1909, of the British Delegates at the Naval Conference to Sir Edward Grey. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 94.

"The American delegation accepts in principle basis No. 24 [Art. 17 of the final draft] with the reservation that the belligerent or the officer in command of the blockading force shall have the right to fix the length of the radius of action which, according to our desire, should not exceed 1,000 miles. The radius of action or zone of operation should be defined, immediately upon the declaration of blockade, by the officer in command of the blockading force, in conformity with article 18. [Art. 9 of the final draft.] The American delegation does not wish to impose upon belligerents set rules as to the length of radius of action, but simply to ask the right to fix a maximum of 1,000 miles when circumstances so demand. The delegation concurs in the remarks of Rear Admiral Le Bris regarding the nature of the radius of action to vary with geographical conditions, the propinquity of neutral ports and interests of neutral commerce, as well as with the force employed.

"By determining the area of the zone of operation the delegation intends to ask that the force employed be proportionate to the zone. No country has been more steadfast than the United States in its opposition to paper blockades and it holds that the force charged with the duty of enforcing the blockade must be proportionate to the zone affected thereby.

"The delegation adds, in explanation of the wide expanse of the desired radius of action, that the demand rests on the ground that blockade running is becoming more and more a night operation and that it is difficult to capture a vessel before daybreak after it has put to sea. The final chase and capture take place where, properly speaking, the outer line of the blockading force is stationed. The distance of that line varies with the length of night darkness which may reach 16 hours, and the speed of the vessels, which may reach 30 knots. The distance may thus represent a zone of 480 miles, and even more if the inner line be very far from the entrance of the port."

Statement of the delegation of the United States to the London Conference regarding "the radius of action."

"Article 43. A merchant vessel shall be seized for violation of blockade when it has attempted by force or strategy to penetrate the line of blockade, or when, after having been sent back once, it tries again to enter the same blockaded port."

Institute (1882), p. 53.

Contra as to British and American Practice.

"It has been a question in the courts of this country, whether they ought to admit the law of the English prize courts, that sailing for a blockaded port, knowing it to be blockaded, was, in itself, an attempt, and an act sufficient to charge the party with a breach of the blockade, without reference to the distance between the port of departure and the port invested, or to the extent of the voyage performed when the vessel was arrested. But in Yeaton *v.* Fry, [5 Cranch, 335]

the Supreme Court of the United States conincided essentially with the doctrine of the English prize courts; for they held, that sailing from Tobago for Curaçoa, knowing the latter to be blockaded, was a breach of the blockade; and, according to the [dissenting] opinion of Mr. Justice Story, in the case of the *Vereide*, [9, Cranch, 440, 446] the act of sailing with an intent to break a blockade is a sufficient breach to authorize confiscation. The offence continues, although at the moment of capture the vessel be, by stress of weather, driven in a direction from the port, for the hostile intention still remains unchanged.

Kent, vol. 1, pp. 155, 156.

Contra as to British and American Practice.

"An actual entrance into a blockaded port is, by no means, necessary to render a neutral ship guilty of a violation of the blockade. Indeed, such a construction would essentially defeat the very object of a blockade, by rendering the capture of a ship lawful, only after such capture had ceased to be possible. Hence it is universally held that an *attempt* to enter the port, knowing it to be blockaded, completes the offense to which the penalty of the law is attached. It is the attempt to commit the offense, which, in the judgment of the law, constitutes the crime, and is as much a breach of neutrality as an actual entrance into the prohibited port. It would be absurd to say that the penalty is not incurred till the unlawful design is fully accomplished, for the offender would, in most cases, be placed, by its accomplishment, beyond the reach of the law. Nor is the word 'attempt' to be understood in a literal and narrow sense. It is not limited to the conduct of the ship at the mouth of the blockaded port, but is applicable to her whole conduct from the moment she has knowledge of the existence of the blockade, and the consequent prohibition of neutral commerce. If she has this knowledge before she begins her voyage, the offense is complete the moment she quits her port of departure, if that knowledge is communicated to her during the voyage, its continued prosecution involves the crime, and justifies the penalty; if it is not given to her till she reaches the blockading squadron, she must immediately retire, or she is made liable to confiscation. It is not the mere mental intention that the law punishes, but it is the overt act by which the execution of an unlawful intent is begun. This overt act is the starting for, or proceeding toward, the prohibited port, with the knowledge that it is blockaded. The same rules prevail in all analagous cases of unlawful voyages.

* * * * * * *

"Several continental writers of authority contend that the inception of a voyage for a blockaded port, with a knowledge of the existence of the blockade, is not such an offense as to render the vessel subject to seizure upon the high seas. Indeed, they regard such seizure as a violation of the liberty of the seas and of the independence of the sovereign state to which the vessel belongs. But English and American publicists have generally held, and the decisions of British and American courts of admiralty seem to sustain the opinion, that the inception of the voyage, with a knowledge of the blockade, and the *intention* to enter, is sufficient in law to constitute the offense and incur penalty, and that the *intention* will be presumed from the

fact of commencing the voyage with the knowledge of the existence of the blockade. They say that the vessel had no right to commence the voyage with such knowledge, and that the act of inception is, in itself, as a general rule, illegal and punishable as a breach of neutrality, and, therefore, that the master or owners are not permitted to aver that they merely intended to proceed to the blockaded port to ascertain, by due inquiry, whether the blockade still continued, and to enter it only in case the blockade had ceased. * * *

"But this general rule is subject to some important exceptions, or rather the inference, from the inception of the voyage with knowledge of the blockade, of *intention* to violate it, may, in some cases, be removed by proof to the contrary. Thus, where the vessel sails from a distant country, she may clear with a provisional destination to the blockaded port, without incurring the penalty of a breach of the blockade, provided it be clearly and positively proved that she intended to proceed to the blockaded port only in case she ascertained, by due inquiry, during the voyage, that the blockade had been raised. This may be shown by instructions to the master not to pursue the voyage unless, by inquiry at a port of the blockading power, or of some neutral state, be found that the blockade had ceased. These instructions to the master must clearly set forth the necessity of the previous inquiry, and the mode in which it is to be made, in order to furnish satisfactory proof of the intentions of the parties. The presumption is against them, and to repel the presumption the equivocal evidence of ambiguous instructions will not be sufficient. But no matter how distant the country from which the vessel sails, she has no right to proceed to the entrance of the blockaded port with a view to ascertain from the blockading force whether she can be permitted to enter. An inquiry from the blockading force is only justifiable when the master, who finds himself in its presence, was ignorant that the blockade existed. In other cases, a vessel found in a situation to make the inquiry, if destined to the blockaded port, is liable, from her previous knowledge, to instant capture. A neutral merchant, says Sir William Scott, has no right to speculate on the greater or less probability of the termination of a blockade, and, on such speculation, to send his vessel to the very mouth of the blockaded river, or port, with instructions to the master to enter, if no blockading force appeared, otherwise to demand a warning, and proceed to a different port. A rule that would permit this, would be introductory of the greatest frauds."

Halleck, pp. 553–555.

"The offence incurred by a breach of blockade generally remains during the voyage; but the offence never travels on with the vessel further than to the end of the return voyage, although if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent cruisers to vindicate the violated law. But where the blockade has been raised between the time of sailing and the capture, the penalty does not attach; because the blockade being gone, the necessity of applying the penalty to prevent future transgression no longer exists. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*.

The *delictum* may have been completed at one period, but it is by subsequent events done away."[1]

Wheaton, p. 686.

Continental Doctrine.

"The continental doctrine" referred to under Art. 11, "necessarily involves this rule,—that no ship is liable until it reaches the place where the blockading ships are stationed. The punishable *fact* is not the sailing across a tract of sea with an intention to do an evil deed, but the *fact* that the vessel tries to enter the blockaded harbor. It is evident that this formal rule increases the temptation to engage in such enterprises, while the other rule may bear hard, as far as evidence is concerned, upon neutral traders. On the other hand the continental rule, if we mistake not, is that the vessel on her return voyage is not liable, although it is admitted that a vessel breaking blockade and running out again may be chased to her own coasts or to any other neutral port. Or, in other words, the *fact* here too must begin at the blockaded port. It is not easy to see a sufficient reason for this rule on the score of the principle."

Woolsey, p. 350.

Contra as to British and American Practice.

"The acts which constitute a violation of blockade necessarily vary with the theory which is held by the belligerent maintaining the blockade as to the conditions of its legality * * *.

"Of the French practice it is sufficient to say that, as it does not admit a presumption in favour of the continuance of a blockade, a distinct attempt to cross the actual barrier by force or fraud is, as a general rule, necessary to justify condemnation. Occasionally however an inference as to intention seems to be allowed, as in the case of a vessel captured before actually endeavouring to enter a blockaded port, but while making for it after having received in the course of her voyage a regular notification from a belligerent cruiser.

"The English and American courts, on the other hand, in arguing from a presumption of continuance to the intention of the neutral trader, subject his property as a general rule to confiscation on seizure at any time after sailing with a clear destination to a blockaded port. Where there is a doubt as to intention they submit to investigation all acts done from the commencement of the voyage. If it appears from these that, though anxious to go to the blockaded port, and sailing with that destination, the trader had no intention of braving the belligerent prohibition, his property will not be condemned. Thus a vessel has been held innocent which sailed from America for Hamburg with an intermediate destination to an English or neutral port for enquiry; and in another case, although the ship's papers did not show in distinct terms at what place enquiry was to be made, she was released on fair grounds being afforded for the inference that an intention to enquire really existed. But acts

[1] In his note to this section Dana (Note 237, p. 686) says:
"Hautefeuille, on the theory of the local jurisdiction displaced and acquired by the blockading force, would limit the right of capture to the region of sea and harbor actually held by that force. (Tom. ii, pp. 239, 244.) But in this he is without support, either by judicial decisions, treaties, the opinions of commentators of received authority, or diplomatic positions taken by nations. The right of capture on the return voyage was maintained by the United States Courts, in the civil war."

of doubtful character will, in the absence of full explanation, be interpreted against the trader. Thus vessels running for a port, known by them to be blockaded, under pretext of taking a pilot on board, because of falsely alleged unseaworthiness, have been held liable to seizure; and the enquiries which it is eminently proper to make at a place sufficiently distant from the blockaded harbor must not be effected at its very mouth. It is not absolutely necessary, in order that a breach may be committed, that the vessel shall herself cross the line of blockade; thus if a vessel lying outside receives her cargo from lighters or vessels which have issued from a blockaded port, she becomes liable to capture."

Hall, pp. 734, 735.

Contra as to British and American Practice.

According to the "French idea" a breach of blockade "did not arise till an attempt was being made to run into the blockaded port or approach the blockaded coast-line, egress being on the same legal footing as ingress. Great Britain and the United States on the contrary claimed and exercised a right to capture any vessel against which could be proved either the intention to break a blockade or the fact of having broken it, provided that she was found before the termination of the return voyage at any point where hostile operations could be carried on lawfully. To put the matter in a nutshell, continental opinion made violation of blockade equivalent to crossing the blockade line; British opinion held it to consist in an attempt to reach the blockaded area. The weak points of both views were ably pointed out in the instructions given to the British delegation at the Naval Conference. They were also informed that no case could be found of a vessel having been condemned by a British court for breach of blockade 'except when actually close to, or directly approaching, the blockaded port or coast.' It appears, therefore, that little or nothing was surrendered when Great Britain agreed at the Conference to accommodate her principles to her practice, and accepted the rule that 'neutral vessels may not be captured for breach of blockade except within the zone of operations of the war-ships detailed to render the blockade effective.'

"It was well understood that this zone or area of operations might cover a wide extent of sea, if the blockaded port was skilfully defended, and possessed a geographical position which rendered the task of closing it effectively an impossibility for any but a large number of vessels. On the other hand it might be quite small if circumstances favored the blockaders. Washington, for instance, might be blockaded by a few warships cruising between Cape Charles and Cape Henry, whereas New York would require cordon after cordon of vessels stretching far out into the Atlantic. But in any case the condition of effectiveness would prevent the extension of the area of blockade into distant seas. It must vary with circumstances, and it may in exceptional cases spread several hundreds of miles from the centre of operations. No attempt to close to trade a place situated on an open coast-line could be really effective unless one of the lines of blockade had to be crossed by daylight; and as a swift blockade-runner can steam about three hundred miles during a long winter's night, at least that distance should intervene between the outer arc

of blockading vessels and the next. Add to this that the line nearest to the shore must keep sufficiently far from land to avoid attacks from torpedoes and submarines, and we see what a stupendous undertaking a big blockade may be under modern conditions, and to what a distance out at sea its outlying scouts may be sent. The presence in the port of a well-found and well-handled squadron would make distances greater and increase the numbers of the blockading vessels. Certainly the rule of the Declaration of London does not confine to a small area the exercise of the belligerent right of capture at sea for breach of blockade, though it does save neutral powers from the risk of having their merchantmen seized on one side of the globe when they are making for a blockaded destination at the other.

"The officiency of blockade as a weapon in the hands of a power which has command of the sea will be in no way impaired by the rule we have discussed. When what we may term the neck of the bottle is the only spot that is watched, all approaching ships will be liable to seizure. In other cases the wide-thrown net of the blockaders will enclose a multitude of vessels. And it must be remembered that any blockade-runner that has tried to enter the closed port or succeeded in leaving it can be pursued by a unit of the blockading force, and may be captured as long as the pursuit continues. A temporary refuge in a neutral port cannot save the hunted vessel. Her pursuer can wait outside till she leaves it and then renew the chase. Moreover a chase may be begun by one of the blockaders and continued by another, and yet another, as long as all of them belong to the force engaged in carrying on the blockade. Only when the pursuit is abandoned, or the blockade raised during its continuance, is the right of capture lost.

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"* * * Loitering outside a blockaded port in order to take advantage of an opportunity to slip in, or to receive cargo from small craft which have penetrated the blockading line outwards, or to transship cargo to them that they may carry it inwards, has been hitherto regarded as a violation of blockade by many powers, and there seems no reason why it should not be looked at in the same way now, provided, of course, that the acts take place within the zone of operations of the blockading force."

Lawrence, pp. 692–695.

"The Second Armed Neutrality of 1800 intended to restrict an attempt to break blockade to the employment of force or ruse by a vessel on the line of blockade for the purpose of passing through. This was, on the whole, the practice of France, which moreover, as stated before, required that the vessel should previous to the attempt have received special warning from one of the blockading men-of-war. Many writers took the same standpoint.

"The practice of other States, as Japan, approved by many writers, went beyond this and considered it an attempt to break blockade when a vessel, with or without force or ruse, endeavoured to pass the line of blockade. This practice frequently saw an attempt complete in the fact that a vessel destined for a blockaded place was found anchoring or cruising near the line of blockade.

According to Art. 17 of the Declaration of London "a neutral vessel, to be guilty of an attempt to break blockade, must actually have

entered the *area of operation* (*rayon d'action*) of the blockading fleet. This *area of operations* is a question of fact in each case of a blockade. 'When a Government decides to undertake blockading operations against some part of the enemy coast it details a certain number of men-of-war to take part in the blockade, and entrusts the command to an officer whose duty it is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the vessels at his disposal according to the line of the coast and the geographical position of the blockaded places, and instructs each vessel as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched taken together and so organised as to make the blockade effective, form the area of operations of the blockading force.'" * * *

"A breach of blockade can only be committed by passing through the blockaded approach. Therefore, if the maritime approach to a port is blockaded whilst an inland canal leads to another unblockaded port of the enemy or to a neutral port, no breach of blockade is committed by the egress or the ingress of a vessel passing such canal for the purpose of reaching the blockaded port.

"Although the Declaration of London does not mention this point, the International Prize Court would surely decide it as stated, since this decision is based on common sense."

Oppenheim, vol. 2, pp. 468, 469, 471, 474.

The effect of Articles 17 and 20 of the Declaration of London, "is that there must be a distinct blockading squadron, which must have a definite area of operations assigned to it, but may cruise within that area; and that a capture for breach of the blockade may only be made by a ship of that squadron, and either within that area or in the course of a pursuit commenced within it, provided in the latter case that the absence of the pursuing ships has not reduced the force remaining within the area so far as to raise the blockade by operation of law. There is nothing in the Declaration to prevent assigning line behind line of ships to the blockade, if the blockading power is able to devote so large a naval force to the purpose, and thereby pushing off the limits within which a capture may be made or a pursuit commenced to the extreme distance at which such a power can make the blockade real. In my judgment a reasonable satisfaction would thus be given, on the one hand to the necessity of admitting blockade by cruisers, on the other hand to the wisdom of freeing commerce from being harassed at too great distance from the blockaded coast."

Westlake, vol. 2, 268.

Contra as to British and American Practice.

A vessel that has knowledge of the blockade "may under the Anglo-American system be captured at any point of her voyage to the blockaded port, and will be condemned, provided that the blockade really existed at the moment of her capture. The offence being deemed in that system to consist in intending to pass a line of investment, its commission dates from the commencement of the attempt to pass it. The only exception is when the vessel has sailed from a port so distant that her owner or master may have had ground for thinking that the blockade might be raised before her arrival,

through a change in the plans of the belligerent government. Then, when met by a cruiser, she will be justified in having prosecuted her voyage with a view to enquiry, but such enquiry ought to be made, and she ought to intend making it, at a neighbouring port and not at the blockaded one. If the blockade of which the owner or master had knowledge was established by a commander on the spot, and had not to the knowledge of the former been adopted by the government of the latter, its continuance is regarded as less certain, and enquiry at the spot will be allowed. If on such enquiry it is found that the blockade continues, the vessel will be dismissed with a warning, and will not be allowed to plead enquiry as her purpose, if she appears a second time at or on her way to the blockaded spot. Under the continental system, which does not admit blockade by cruisers, there can be no real blockade if there is not a ship at the spot of which enquiry can be made. Hence an enquiry is always allowed on the first visit to the spot, but after the warning then given the next visit will be punished by capture and confiscation, the illegitimate intention being deemed to be manifest."

Westlake, vol. 2, pp. 269, 270.

"Art. 131. A vessel which has not herself passed out from within the line of blockade, nevertheless commits a breach of the blockade outwards, if, whilst lying outside the line of blockade, she takes on board her cargo from lighters or other vessels which have been sent out from within the line of blockade.[1] But she does not commit a breach of the blockade outwards if her cargo is brought to her from the blockaded port, either overland, or by canal navigation in lighters which have not passed the line of blockade.[2]"

Naval Prize Law, Holland.

"Art. 132. If, in breach of a blockade outwards, goods are carried from a blockaded to an open port, and there landed, and then, by way of *bona fide* exportation, laden on board another vessel, such other vessel, by taking such goods on board, does not commit a breach of the blockade outwards; and, being free herself, the goods on board her are also free."

Naval Prize Law, Holland.

"Art. 133. Holland's Naval Prize Law provides that a breach of blockade inwards is committed by a vessel that "in the case of a Blockade by Notification, has sailed, after the notification has taken place, with the blockaded port for her destination, however distant from it she may be at the time when she is visited;[3] except;

"(*a*) When sufficient time has not elapsed for the notification to have been communicated by the Neutral Government to its subjects.[4]

"(*b*) When the port from which the vessel sails is so distant from the scene of the war as to justify her Master in starting with a destination known to be blockaded, on the chance of finding that the

[1] "*Maria*, 6 C. Rob. 201. *Charlotte Sophia*, 6 C. Rob. 204*n*. *Lisette*, 6 C. Rob. 387."
[2] "*Ocean*, 3 C. Rob. 297. *Stert*, 4 C. Rob. 65."
[3] "*Vrouw Joanna*, 2 C. Rob. 109. *Neptunus*, 2 C. Rob. 111. *Circassian*, 2 Wallace, 135."
[4] "*Jonge Petronella*, 2 C. Rob. 131. *Adelaide*, 3 C. Rob. 281."

blockade has been removed, and, should that not prove to be the case, with an intention of changing her destination.[1] "

"ART. 44. The liability of a vessel purposing to evade a blockade, to capture and condemnation, begins with her departure from the home port and lasts until her return, unless in the meantime the blockade of the port is raised."

United States Naval Code, 1900.

"ART. 29. A ship which, having received notice of the blockade, comes under any one of the following clauses shall be held to have committed a breach of blockade inwards: * * *

"(3) A ship which, while outside the blockaded area, transships her cargo to another, and by causing that other to cross the line of blockade, assists in carrying the said cargo inside the blockaded area, or tries to do so.

"(4) A ship which sails with the blockaded port as her destination."

Japanese Regulations, 1904.

" 76. A breach of blockade is to be assumed as existing when a ship breaks through the blockade zone, or attempts to break through with intent to reach or leave a blockaded port.

" By blockade zone is to be understood the adjacent sea area which is controlled by the vessels of war which are charged with maintaining effectiveness of the blockade.

" The width of the blockade zone, and its position as well, depends upon the military and geographical conditions, as also upon the number of the disposable ships; but it may not, according to 58, be so situated that a neutral port or a neutral coast is accessible only by breaking through the blockade zone."

" 77. A ship may be captured for breach of blockade not before it has reached the blockade zone in—or outgoing."

German Prize Rules, 1909.

Article 17 of Declaration of London, 1909, substantially appears as Art. 98 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Moore at page 823 of Volume 7 of his International Law Digest quotes the following excerpt from the instructions, dated May 17, 1806, of the American Secretary of State to the Ministers to England:—

"'* * * The perseverance of Great Britain in considering a notification of a blockade, and even of an intended blockade, to a foreign government, or its ministers at London, as a notice to its citizens, and as rendering a vessel, wherever found in a destination to the notified port, liable to capture, calls for a special remedy. The palpable injustice of the practice is aggravated by the auxiliary rule prevailing in the British courts, that the blockade is to be held in legal force until the governmental notification be expressly rescinded,

[1] *Betsy*, 1 C. Rob. 332. This indulgence was granted early in this century to vessels sailing from America, on the ground that otherwise 'the effect of a blockade would last two months' longer upon them than upon the trading nations of Europe.' It may be doubted whether such an indulgence can be reasonably expected since the introduction of steamships and telegraphic cables."

however certain the fact may be that the blockade was never formed, or had ceased. You will be at no loss for topics to enforce the inconsistency of these innovations with the law of nations, with the nature of blockades, with the safety of neutral commerce, and particularly with the communication made to this government by order of the British Government in the year 1804, according to which, the British commanders and vice-admiralty courts were instructed not to consider any blockade of the islands of Martinique and Guadaloupe as existing, unless in respect of particular ports which may actually be invested, and then not to capture vessels bound to such ports, unless they shall previously have been warned not to enter them.'"

In the case of the *Neptunus* (1799) (2 C. Rob. 110, Scott, 796), Sir William Scott said in regard to a blockade that had been formally notified to neutrals that, "it is to be presumed that the notification will be formally revoked, and that due notice will be given of it: till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination the offense of violating the blockade is complete."

In the case of the *Columbia* (1799) (1 C. Rob. 154), it was contended that as the vessel was captured before arriving off the blockaded port, "the offence was not actually committed, but rested in intention only." In respect to this contention Sir William Scott said: "I am clearly of opinion, that the sailing with an intention of evading the blockade of the Texel, was beginning to execute that intention; and is an overt act constituting the offence. From that moment the blockade is fraudulently invaded. I am, therefore, on full conviction, of opinion, that a breach has been committed in this case."

Sir William Scott in the *James Cook* (1810) (Edw. 261) said: "It has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded port even to make inquiry; that in itself is a consummation of the offense and amounts to an actual breach of the blockade."

In the case of the *Memphis* (1862) (Blatch. 260), a neutral-owned vessel and her neutral-owned cargo were captured at sea for violation of the blockade of Charleston, S. C., by a vessel that was not a part of the blockading squadron.

The court in condemning both vessel and cargo said: "The point taken by the claimants, that the capture in this case is invalid because not made by a vessel actually stationed at the blockaded port, is not supported by any authority produced, nor does it comport with any reason upholding the authority of a belligerent to repress infractions of a blockade. The guilty vessel does not purge her offence by a successful act of fraud or deceit in preventing an arrest by the force supporting the blockade. Her capture is lawful, although the blockading force may be entirely absent from its post when the culpable act is committed. (1 Kent's Comm., 145.) Any public vessel of the belligerent whose rights are violated may be the agent or minister to apprehend the offender, though, by dexterity or superior speed, the culpable actor may escape arrest at the time or place of the perpetration of the wrong. The only question which seems to be allowed in that respect is, whether the capturing vessel possessed the attributes of a national ship, so as to be entitled to participate in prize proceeds.

(The *Charlotte*, 5 Ch. Rob., 280; The *Melomane*, Id., 50.) Yet, aside from any right to a participation in the prize proceeds, the power to capture an enemy vessel by any national force at sea seems irrefragable, whether the liability of the vessel attached arises from her positive hostile character, or from her violation of the belligerent rights of the captor. (The *Charlotte*, 1 Dods., 220; The *Donna Barbara*, 2 Hagg., 373.) The vessel and cargo in this case were captured *in flagrante delicto;* and after the undisguised avowal by the officers, on their examination *in preparatorio*, and the open contract on the shipping articles, all recognizing the culpability of both voyages, with the papers on board verifying the reward paid to the crew for accomplishing the illicit enterprise, it is not without surprise that the court has witnessed a formal issue made by the claimants on the justness of the seizure of the vessel and cargo. The legal point which has been pertinaciously invoked by the defence, that the United States public ship which arrested the culprit, not being stationed off the port as one of the blocking squadron, had no authority to make the capture, has no foundation in American or English prize law. A vessel guilty of an unlawful trade with the enemy is liable to capture for the offence at any time during the voyage in which the offence is committed. (Halleck on International Law, Chapter 21, section 12.)"

The *Ouachita* (1862) (Blatch P. C. 306, 652) was a neutral owned vessel captured for breach of blockade of Charleston. It was claimed on the part of her owners that the capture was illegal in that it was made by a vessel, not in the lawful possession of the naval forces of the United States, such vessel not as yet having been condemned as a prize.

The court said: "The point made for the claimant, that the capture of this vessel by the *Memphis* is void at law, on the ground that the latter vessel was incompetent to be employed to that end or in that service, cannot be regarded as of any weight. She was captured by a vessel commanded and employed by the United States naval forces, and acting under its flag and authority.

"If the vessel arrested was acting in violation of public law, she is amenable to trial and condemnation therefor, in behalf of the United States, whether the persons or means employed in making the seizure had authority to make it or not. It is enough that the government comes into the national court demanding the condemnation of an offender; and the court never inquires whether the party or thing proceeded against has been regularly or irregularly brought under attachment or complaint. The government are entitled to have the violated laws vindicated by the punishment of the offender, without question as to the propriety of the acts or agencies used in bringing the offence to judgment. (The *Amiable Isabella*, 6 Wheat., 1.)"

In the case of the *Duoro* (1863) (Blatch. 362), the court said: "The questions of law with respect to the existence of the blockade of the place visited by this vessel, and its efficiency and the authority of a vessel-of-war of the United States, not stationed on guard of a blockaded port, to seize a vessel violating such blockade, has been too frequently determined by this court, during the continuance of the present war, to require a repetition of that course of decisions, until the law is called in question by a judicature of higher authority."

The decree condemning this vessel and her cargo was affirmed in the Supreme court (1865) (3 Wall. 564). The higher court said that "it is impossible to imagine a plainer case for condemnation."

In the *Circassian* (1864) (2 Wall., 135, 151), the court said: "It is a well-established principle of prize law, as administered by the courts, both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo to capture and condemnation. We are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbors, and blockade running from neutral ports seems to have been organized as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights. It is not likely to be abandoned until the nations, by treaty, shall consent to abolish capture of private property on the seas, and with it the whole law and practice of commercial blockade."

In support of this proposition the court cited the following cases: Yeaton *v.* Fry, 5 Cranch, 335; 1 Kent's Commentaries, 150; The *Frederick Molke*, 1. C. Rob. 72; The *Columbia*, 1 Id. 130; The *Neptune*, 2 Id. 94.

In the case of the *Admiral* (1865) (3 Wall., 603), it was contended "that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is not an offense against the law of nations where there is no premeditated intention of breaking the blockade." The court said this proposition as stated "is undoubtedly correct, but it is equally well established that it is illegal for a ship having knowledge of the existence of a blockade to attempt to enter a blockaded port in violation of the blockade, and this court decided at the last term that after notification of a blockade the act of sailing for a blockaded port with the intention of violating the blockade is in itself illegal."

In the case of the *Adula* (1900) (176 U. S. 361, Scott, 826), it was said by the court that "The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a vialation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. Yeaton *v.* Fry, 5 Cranch, 335; The *Circassian*, 2 Wall. 135; The *Frederick Molke*, 1 C. Rob. 72; The *Columbia*, 1 C. Rob. 130; The *Neptunus*, 2 C. Rob. 110; Wheaton on Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. The *Admiral*, 3 Wall. 603; The Prize Cases, 2 Black, 635, 677; Duer on Ins. 661; The *Cheshire*, 3 Wall. 231; The *James Cook*, Edwards, 261; The *Josephine*, 3 Wall. 83; The *Spes*, 5 C. Rob. 76; The *Betsey*, 1 C. Rob. 332; The *Neptunus*, 2 C. Rob. 110; The *Little William*, 1 Acton, 141, 161; Sperry *v.* Delaware Ins. Co., 2 Wash. C. C. 243."

The blockading forces must not bar access to neutral ports or coasts.—*Article 18, Declaration of London, 1909.*

"This rule has been thought necessary the better to protect the commercial interests of neutral countries; it completes article 1, according to which a blockade must not extend beyond the ports and coasts of the enemy, which implies that, as it is an operation of war, it must not be directed against a neutral port, in spite of the importance to a belligerent of the part played by that neutral port in supplying his adversary."

General report of drafting committee to London Naval Conference.

"ARTICLE 6. In time of war, navigation upon international rivers is free for the flags of neutral nations, except as to the observation of restrictions imposed by the force of circumstances."

Institute (1887), p. 79.

"During the late [Civil] war the mouth of the Rio Grande, between Texas and the neutral territory of Mexico, was not blockaded, and it seems, it could not have been."

Kent, vol. 1, p. 152, note.

"The right of a belligerent to blockade the territory of his enemy is sometimes complicated by the territorial rights of conterminous governments. If one bank of a river is within a neutral state, or if the upper portion of its navigable course is beyond the frontier of the hostile country, a belligerent can only maintain a blockade so far as is consistent with the right of the neutral to preserve free access to his own ports or territory, and with the right of other neutrals to communicate freely with him. Thus a blockade of Holland was held not to be broken by a destination to Antwerp. And during the American Civil War, the Courts of the United States conceded that trade to Matamoros, on the Mexican shore of the Rio Grande, was perfectly lawful; but the Supreme Court laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan territory; and in the case of vessels captured for being north of that line, refused, while restoring them, to allow their costs and expenses.

"It is to be hoped that a rule so little consistent with the right of neutrals to uninterrupted commerce with each other will not be drawn into a precedent."

Hall, p. 738.

This is not a new provision of International law "but has been for some time generally accepted as a corollary of the rule that blockades must not extend beyond the coasts belonging to an enemy or in his military occupation. In the American Civil War the Federal gov-

ernment did not attempt to include the mouth of the Rio Grande in its blockade of the Southern coast, because the middle of the stream formed the boundary between the United States and Mexico, and the Mexican port of Matamoras was situated within the estuary. Moreover in 1870 the French took a similar course with regard to the Ems, and the Hanoverian ports on it which they deemed neutral in their struggle with Prussia."

Lawrence, p. 685.

Boundary Waters.

"It is a moot question whether the mouth of a so-called international river may be the object of a blockade, in case the riparian States are not all belligerents. Thus, when in 1854, during the Crimean War, the allied fleets of Great Britain and France blockaded the mouth of the Danube, Bavaria and Würtemberg, which remained neutral, protested. When in 1870 the French blockaded the whole of the German coast of the North Sea, they exempted the mouth of the river Ems, because it runs partly through Holland. And when in 1863, during the blockade of the coast of the Confederate States, the Federal cruiser *Vanderbilt* captured the British vessel *Peterhoff* destined for Matamoros, on the Mexican shore of the Rio Grande, the American Courts released the vessel on the ground that trade with Mexico, which was neutral, could not be prohibited.

"The Declaration of London would seem to settle the controversy only as regards one point. By enacting that 'the blockading forces must not bar access to neutral ports or coasts,' article 18 certainly prohibits the blockade of the whole mouth of a boundary river between a neutral and a belligerent State, as, for instance, the River Rio Grande in case of war with the United States of America, provided Mexico remained neutral. But no provision is made for the case of the blockade of the mouths of rivers, such as the Danube or the Rhine, for example, which pass through several States between their sources and their mouths at the sea coast, if one or more upper riparian States remain neutral."

Oppenheim, vol. 2, p. 454.

"Where there are neutral states on the upper waters of a river, it is clear on principle that a belligerent's right of blockading either the whole or one side of its mouth cannot entitle him to interfere with the commerce of those states, though the rule has not perhaps been always respected.

"A blockade cannot affect the commerce which the blockaded port carries on through a neutral port with which it has inland communication."

Westlake, vol. 2, pp. 275, 276.

ART. 131, Holland's Naval Prize Law, provides that a vessel does not commit a breach of blockade outward "if her cargo is brought to her from the Blockaded Port, whether overland, or by canal navigation in lighters which have not passed the line of Blockade."

ART. 133, Holland's Naval Prize Law, provides that "it is no breach [of blockade] for a vessel to deliver goods at an adjoining port not itself blockaded, even though the goods are destined for the

blockaded port, provided that they are to be transported thither overland or by canal navigation, without crossing the blockaded line."

Holland cites on this point, The *Jonge Pieter*, 4 C. Rob., 79.

"58. * * * the blockading force must not bar the passages to neutral ports and coasts."

German Prize Rules, 1909.

"65. The blockading forces must not bar access to neutral ports or coasts."

French Naval Regulations, 1912.

Article 18 of Declaration of London, 1909, substantially appears as Art. 99 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"A neutral professing to be engaged in trade with a neutral port situated so near to a blockaded port as to warrant close observation by the blockading squadron must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, so far as position can repel, all imputation of intent to break the blockade; and neglect of that duty may well justify capture and sending in for adjudication, though it might not justify a condemnation in the absence of evidence that the neglect was willful. The *Dashing Wave*, 5 Wall. 170."

Moore's Digest, vol. 7, p. 831.

"A blockade which was intended to 'blockade the whole coast, from the Chesapeake Bay to the Rio Grande,' did not include the mouth of the Rio Grande, the middle of that stream forming the boundary line between the United States and Mexico, and the free navigation of the river being guaranteed by treaty. The presumption from these facts could be overcome only by an express declaration to that end. Hence trade, during the rebellion, between London and Matamoras, two neutral places, the latter an inland port of Mexico and close to the Mexican boundary line, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the United States, was not unlawful on the ground of such violation. The *Peterhoff*, 5 Wall. 28."

Moore's Digest, vol. 7, p. 785.

In the case of the *Ocean* (1801) (3 C. Rob. 297, Scott, 819), a vessel from Rotterdam to America was seized for alleged violation of blockade of the port of Amsterdam, it being claimed that the cargo had been carried from Amsterdam to Rotterdam and then transshipped, as the former port was under blockade while the latter was not.

In rendering judgment restoring the ship, Sir William Scott said: "I am inclined to consider this matter favourably, as an exportation from Rotterdam only, the place in which the cargo becomes first connected with the ship. In what course it had travelled before that time, whether from Amsterdam at all, and if from Amsterdam whether by land carriage or by one of their inland navigations, Rotterdam being the port of actual shipment, I do not think it material

to inquire. On this view of the case it would be a little too rigorous to say, that an order for a shipment to be made at Amsterdam should be construed to attach on the owner, although not carried into effect. It has been said from the letter of the correspondent at Amsterdam, that the agents there had informed their correspondents in America that the blockade was not intended to prevent exportation: The representation of the enemy shipper could not have availed to exonerate the neutral merchants, if otherwise liable. Were this to be allowed, it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that *egress* as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in breaking it.

"It happens in this case, that the intended exportation did not take place. The only criminal act, if any, must have been the conveyance from Amsterdam to Rotterdam. It would be a little too much to say, that by that previous act the goods shipped at Rotterdam are affected. The legal consequences of a blockade must depend on the means of blockade; and on the actual or possible application of the blockading force. On the land side Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation. If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of Amsterdam."

In the case of the *Stert* (1801) (4 C. Rob. 65), a vessel was captured for outward breach of the blockade of Amsterdam while taking a cargo to the neutral port of Embden by means of canal navigation.

Sir William Scott in holding this not to be a good capture said: "A blockade may be of different descriptions. The blockade of Amsterdam, which was imposed on the part of this country, was, from the nature of our situation, a mere maritime blockade, effected by force operating only at sea. As far as that force could be applied, it was, indubitably, a good and legal blockade; but, as to an interior navigation, how is it a blockade at all? Where is the blockading power? Let us suppose the case of the blockade of Havre. Can it be said that, by the maritime blockade of the Seine, the interior access to Havre is blockaded, so as that goods belonging to a neutral subject, sent from Paris to Havre, could be held subject to confiscation by virtue of the blockade? It is argued that, if this course of trade is allowed, the object of the blockade, which is to distress the trade of Holland, will be defeated. If that is the consequence, all that can be said is, that it is an unavoidable consequence. It must be imputed to the nature of the thing, which will not admit of an effectual remedy of this species. This court cannot, on that ground, take upon itself to say that a legal blockade exists, where no actual blockade can be applied. In the very notion of a complete blockade, it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear; and, where such a partial blockade is undertaken, it must be presumed that this is no more than

what was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent in which it was practicable. The commerce, though partially open, is still subjected to a pressure of difficulties and inconvenience. To cut off the power of immediate export and import from the ports of Holland is, of itself, no insignificant operation, although it may not be possible to exclude them from the benefit of an inland communication. If the blockade be rendered imperfect by this construction, it must be ascribed to the physical impossibility of the measure, by which the extent of its legal pretensions is unavoidably limited."

In the case of the *Jonge Pietre* (1801) (4 C. Rob. 79), involving the shipment of certain goods to a neutral port with an ultimate destination by inland canal navigation to the blockaded port of Amsterdam, Sir William Scott held that such a shipment on the assumption that the goods were neutral property "is not according to any conception, a breach of the blockade."

In the case of the *Anna* (1810) (Edw. 190), Sir William Scott said: "It is not within the power of this court to extend the operation of the blockade beyond the limits which the public authority has assigned to it. I cannot admit that because the port of St. Sebastian's borders on ports which are blockaded, that therefore it is less accessible than any other open port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent."

In the case of the *Gerasimo* (1857) (11 Moore, P. C. 88, Scott, 811), a Wallachian ship, "with a cargo of corn belonging to the owners residing at Galatz in Moldavia, was seized for breach of the Black Sea blockade, when coming out of the Sulina mouth of the Danube then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia, but such holding was with the express intention of not changing the national character, or incorporating that country with Russia." The decree in condemnation was appealed to the Privy Council, where it was suggested "that *The Gerasimo* was guilty of a break of blockade in coming out of the Danube when the mouths of that river were in a state of notified blockade. It is singular that if this were the ground of capture, no notice whatever of the blockade should have been continued in the affidavit originally prepared for Captain Powell to swear when the seizure was made, and the facts recent; that notice of it should be introduced for the first time in the affidavit made by him on the 30th of August, 1855; and that even in that late affidavit it is not stated that breach of blockade was the cause of the seizure.

"There is no doubt, however, that breach of blockade, whether it was the cause of seizure or not, may be used as ground of condemnation, if the circumstances of the case bring it within the law.

"What, then, were the circumstances? In the summer of 1854, the Russian forces in the Turkish territories were straitened for provisions. The allied fleets desired to prevent the importation of provisions up the Danube, and with that view the two admirals in command of the English and French fleets issued a proclamation, dated the 2d of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the Danube, in order to stop all transport of provisions to the Russian armies;

they declared that this blockade included all those mouths of the Danube which communicate with the Black Sea, and they apprized all vessels of every nation that they will not be able to enter the river till further orders (*qu'ils ne pourront entrer dans ce fleuve jusqu'a nouvel ordre*).

"On the 26th of June, the Russians forbade all export of cereals after the 2d of July. Any exportation of cereals, therefore, was in furtherance of the objects of the allies, and to the prejudice of the Russians. Could a Moldavian merchant imagine, if he had heard of this blockade, that he was to be liable to capture by the allies for exporting provisions, when the whole purpose of the blockade was declared to be to prevent their import?

"But, by the rules of law, when a ship has entered a blockaded port before the blockade, she is entitled to come out again; and if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out. The blockade of a port is *prima facie* evidence of the existence of the blockade to all who are within it, because the inhabitants who see the blockading ships off their coast cannot be well ignorant of the blockade. But this was no blockade of the port of Galatz, but a blockade of the mouths of the Danube, Galatz lying on its banks up the river, at a distance of 150 miles from its mouth.

"In this case the ship had entered the river before the blockade; the cargo was taken on board on the 30th of June; and the ship must have sailed on or before the 2d of July; otherwise she would have been detained by the Russians. If she had no notice of the blockade, she was, on that general ground, entitled to bring out her cargo; if she had notice, she never could suppose that, according to the notification, she could be liable to capture; but if the case had been open to any suspicion, then the claimant has been deprived, by the wrongful act of the captors, of the opportunity of affording the explanations which the rules of law were intended to secure him.

"Of the law applicable to the case, as it appears to their lordships, they can not express their opinion better than in the language used by the learned judge of the court below, in the beginning of his judgment on the hearing before him. He says: 'On the part of the claimants, a very long argument was addressed to the court, impugning the conduct of the captors, and charging them with having improperly brought the vessel to Constantinople. It has been further stated that there being no means of examining witnesses at Constantinople, great unnecessary delay had occurred, and that the captors were responsible for such delay and all the consequences. The court is not disposed to deny the truth and justice of the principle contended for; on the contrary, I am clearly of the opinion, that if a delay in bringing to adjudication, and the nonexamination of witnesses, arise, though it may be almost impossible for the government of the belligerent nation to prevent such occurrence, still that neutrals ought to be indemnified if injustice has been done them. The captors in the first instance, though they may be perfectly blameless, are responsible to the neutrals, and they must look to their own government for redress, if they have been compelled to make good any injury sustained by neutrals, in consequence of their fulfilling the commands which they dare not disobey. In many cases the captains of some of her Majesty's cruisers may have a discretion to release at once, but

this may not be so in the case of a blockade, when special orders may have been given to capture and detain.'

"In this statement of the principles of law, their lordships cordially concur. What claim the captor, Captain Powell, may have upon her Majesty's Government, it is not their duty to judge, nor have they any means of forming an opinion. But as regards the claimants, his conduct appears to be without any excuse, and their lordships have no hestitation in advising restitution of the cargo, with cost and damages against the captors."

In the *Peterhoff* (1866) (5 Wall. 28) the court said: "It is impossible to say * * * in the absence of an express declaration to that effect, that it was the intention of the government to blockade the mouth of the Rio Grande one half of which belonged to a neutral country. And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations."

In the *Dashing Wave* (1866) (5 Wall. 170) the court said: "It is the plain duty of a neutral claiming to be engaged in trade with" a neutral port that lies adjacent to a blockaded enemy boundary, "to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region."

CAPTURE, FOR BREACH OF BLOCKADE, NOT TO BE MADE WHEN VESSEL ON WAY TO NON-BLOCKADED PORT.

Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.— *Article 19, Declaration of London, 1909.*

"It is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough to justify the capture, for breach of blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port."

General report of drafting committee to London Naval Conference.

Contra.

"1. When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of 'continuous voyage' consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port."

"2. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere." * * *

"7. There are passages in the judgments of cases decided in the British Prize Courts which indicate that, where an ulterior port is blockaded, a vessel intending to attempt to enter such blockaded port at a later stage of her voyage would not be exempt from condemnation if seized while making for a neutral port, provided that such seizure and condemnation were consistent with the principles set out in section 21 of the Memorandum of blockade. But the fact that there is no reported case where condemnation under such circumstances has been decreed, suggests that in practice this doctrine can hardly ever be applied.

"Where the ship does not intend to proceed to the blockaded port, the fact that goods on board are to be sent on by sea or by inland transport is no ground for condemnation.

"A ship which has succeeded in coming out of a blockaded port is liable to capture until the conclusion of the voyage, as indicated by her papers, and such voyage is not terminated by the mere touching at an intermediate port."

Memorandum of views of British Government as to rules of international law in points enumerated in the programme of the London Conference. British Parliamentary Papers, Misc. No. 4 (1909), (Cd. 4554), pp. 7–9.

Contra.

"25. The principle underlying the doctrine of continuous voyage is not of recent origin, and may be regarded as a recognized part of the law of nations. * * *"

"26. For the purposes of blockade * * * the destination justifying capture is that of the ship, and not of the cargo; and a vessel whose final destination is a neutral port cannot, unless she endeavours, before reaching that destination, to enter a blockaded port, be condemned for breach of blockade, although her cargo may be earmarked to proceed in some other way to the blockaded coast. His Majesty's Government believe that all the Powers will probably be in agreement on this point, unless the United States were to maintain that the condemnation pronounced by their Supreme Court in the well-known case of the *Springbok* extended the application of the doctrine of continuous voyage to breaches of blockade, and rendered the vessel carrying a cargo destined for a blockaded port liable to seizure, even though she herself was not proceeding to such port. It is, however, exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly, if such was the intention, the decision would *pro tanto* be in conflict with the practice of the British courts. His Majesty's Government see no reason for departing from that practice, and you should endeavour to obtain general recognition of its correctness."

Instructions, December 1, 1908, from Sir Edward Grey to Lord Desart, British delegate to the London Conference, British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 27.

"8. * * * The non-applicability of the doctrine of continuous voyage to cases of blockade-running has been definitely and unanimously recognized by article 19 of the Declaration."

Report, March 1, 1909, of the British Delegates at the Naval Conference to Sir Edward Grey. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 94.

"Article 44. Seizure on the ground of violation of blockade shall not be justified by the fact that a merchant vessel has gone in the direction of the blockaded port, or by the character of the lading alone, or by the mere fact that the destination of the vessel is such a port. In no case can the doctrine of continuous voyage justify condemnation for violation of blockade."

Institute (1882), p. 53.

Contra.

The doctrine of continuous voyage is "important in case of suspicion of an intent to break blockade. If a cargo is destined to be carried through blockade, it can be captured at any stage of the voyage. A neutral destination will often be interposed in such case, with all the ceremonies of landing, transshipping, sale, &c., as in the case of contraband; and the same tests and principles of reasoning apply to both. * * * If the only objection to the cargo be, its destination to be carried through blockade, it is not enough to show that it was destined ultimately for a blockaded place, if it was to be landed at a port not blockaded, whether an enemy's or neutral, and carried thence by land to the blockaded port; for, in that case,

there is not an intent to carry the cargo through the blockade. (The *Staat*, Rob. iv. 65. *Jonge Pieter*, Ibid. iv. 79. *Ocean*, Ibid. iii. 297.) In these cases, it was held, that where a harbor of a city is blockaded by sea, it is not a breach of blockade to send goods to or from that city by a canal navigation which has a separate access to the sea, if that access is not itself under effective blockade.

"But, if a cargo destined from the blockaded city is sent through the blockade in lighters to a vessel in a port not under blockade, and is captured in that vessel on its way to its destination, there has been a breach of blockade. It is one voyage and one transaction. (The *Maria*, Rob. vi. 201. *Charlotte Sophia*, Ibid. 204, note. *Lisette*, Ibid. 394.) The same rule would apply to a cargo destined to such a city, intended to be landed at a near port not under blockade, and to be sent through the blockade in lighters. But, if the cargo is destined to the city, and the vessel is to be run on shore, and the cargo landed and sent to the city by land-carriage there, it would not be an attempt to break blockade, unless the blockade effectively extended over the place where the cargo is to be run ashore.

"In exercising the search into the continuity of the voyage, if it appears that the carrier did not know of any destination of the cargo beyond that of the neutral port, and that his ignorance was excusable, he does not lose his freight and expenses. (*Ebenezer*, Rob. vi. 256.)"

Wheaton, Dana's Note 231, p. 668.

Contra.

The "United States courts have ruled that even if ostensibly bound to a neutral port, provided an ultimate intention to try a blockaded port is apparent the ship may be confiscated. But as the question of intent is a difficult one to prove in such a case, this ruling has been much criticised, and should be followed with caution."

Woolsey, p. 351.

Contra.

"During the American Civil War the courts of the United States strained and denaturalised the principles of English blockade law to cover doctrines of unfortunate violence. A vessel sailing from Bordeaux to Havana, with an ulterior destination to New Orleans, or in case that port was inaccessible, to such other place as might be indicated at Havana, was condemned on the inference that her owner intended the ship to violate the blockade if possible, notwithstanding that the design might have been abandoned on the information received at the neutral port; and goods sent from one neutral port to another within the same dominions with an intent, formed either at the time of shipment or afterwards, of forwarding them to a place under blockade were condemned, and carried with them to a common fate the vessel in which they were embarked, notwithstanding that their transhipment was intended, unless there was reason to believe that the owners of the vessel 'were ignorant of the ulterior destination of the cargo, and did not hire their ships with a view to it.'"

Hall, p. 735–736.

"If, however, the innocent destination is a mere blind, and the ship does not intend to visit it, but is bound directly and immedi-

ately for a blockaded port, she may be seized, and will assuredly be condemned. The rule is directed against the application to blockade of the doctrine of continuous voyages, under which in its modern form the ulterior destination of the cargo was considered, and if it could be shown that, after entering an open neutral port, it or any considerable part of it was to be sent on to a blockaded port in either the same vessel or another, ship or cargo, or both, were condemned. Under the Declaration of London, the blockading warships must wait till the second stage of the transit is proceeding, and the vessel is heading for the blockaded port and has entered their area of operations before they can effect a capture. They must not subject the neutral port to what has been well described as a blockade by interpretation."

Lawrence, p. 694–695.

Contra.

As distinguished from the French practice, "the practice of Great Britain and the United States of America went furthest, since it considered it an attempted breach of blockade when a vessel, not destined according to her ship papers for a blockaded port, was found near it and steering for it; and, further, when a vessel destined for a port, the blockade of which was diplomatically notified, started on her journey knowing that the blockade had not been raised, except when the port from which the vessel sailed was so distant from the scene of war as to justify her master in starting for a destination known to be blockaded, on the chance of finding that the blockade had been removed, and with an intention of changing her destination should that not prove to be the case. This practice, further, applied the doctrine of continuous voyages to blockade, for it considered an attempt of breach of blockade to have been committed by such vessel as, although ostensibly destined for a neutral or an unblockaded port, is in reality intended, after touching there, to go on to a blockaded port.

"During the Civil War the American Prize Courts carried the practice further by condemning such vessels for breach of blockade as knowingly carried to a neutral port cargo ultimately destined for a blockaded port, and by condemning for breach of blockade such cargo, but not the vessel, as was ultimately destined for a blockaded port, when the carrying vessel was ignorant of this ulterior destination of the cargo. Thus the *Bermuda*, a British vessel with a cargo, part of which was, in the opinion of the American Courts, ultimately destined for the blockaded ports of the Confederate States, was seized on her voyage to the neutral British port of Nassau, in the Bahama Islands, and condemned for breach of blockade by the American Courts. The same happened to the British vessel *Stephen Hart*, which was seized on her voyage to the neutral port of Cardenas, in Cuba. And in the famous case of the *Springbok*, a British vessel also destined for Nassau, in the Bahama Islands, which was seized on her voyage to this neutral British port, the cargo alone was finally condemned for breach of blockade, since, in the opinion of the Court, the vessel was not cognisant that the cargo was intended to reach a blockaded port. The same happened to the cargo of the British vessel *Peterhoff* destined for the neutral port of Matamaros, in

Mexico. The British Government declined to intervene in favor of the British owners of the respective vessels and cargoes."

"It is true that the majority of authorities assert the illegality of these judgments of the American Prize Courts, but it is a fact that Great Britain at the time recognised as correct the principles which are the basis of these judgments."

Oppenheim, vol. 2, pp. 469, 470.

"But the fact alone that a neutral vessel has entered the area of operations is not sufficient to justify her capture, she must also be destined and be on her way to the blockaded port. If she passes through the area of operations without being destined and on her way to the blockaded port, she is not attempting to break the blockade. Even should the ulterior destination of a vessel or her cargo be the blockaded port, she is not considered to attempt to break the blockade, if, at the moment of the visitation, she is really on her way to a non-blockaded port (article 19). However, she must really, and not only apparently, be on her way to a non-blockaded port; if it can be proved that in reality her immediate destination is the blockaded port and that she only feigns to be destined for a non-blockaded port, she may be captured, for she is actually attempting to break the blockade.

"From these stipulations of the Declaration of London it becomes quite apparent that the application to blockade of the doctrine of continuous voyage in any form is not admissible."

Oppenheim, vol. 2, pp. 471, 472.

Contra.

"ART. 134. The ostensible destination of a Vessel is sometimes a Neutral, or unblockaded Enemy, port, while she is in reality intended, after touching there, to go on to a blockaded port. In such a case her destination is held to be for the blockaded port from the time of sailing."[1]

Naval Prize Law, Holland.

"ART. 42. A neutral vessel may sail in good faith for a blockaded port, with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. In such case she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, sufficient doubt as to the good faith of the proceeding will subject her to capture."

United States Naval Code, 1900.

"79. It is not a violation of blockade by entry when the ship is actually on the way to an open port, even when the ship intends to

[1] "It is reasonable in such a case to hold that the voyage is 'continuous,' but in the late Civil War in the United States, their Courts gave a new and far-reaching application to this doctrine, holding that a vessel was liable to capture for breach of blockade during the whole of her voyage, although having a *bonâ fide* Neutral destination, if it could be inferred that the cargo was intended, after being landed at the Neutral port, to be forwarded whether by the same, *or by another* vessel, to a blockaded port. In such cases the cargo was condemned, and the ship also 'unless the owners were ignorant of the ulterior destination of the cargo.' (See *Bermuda*, 3 Wallace, 514. *Springbok*, 5 Wallace 1.)"

proceed thence to a blockaded port or her cargo will be forwarded to such a port."

German Prize Rules, 1909.

"84. Whatever may be the ulterior destination of the vessel or of its cargo, the evidence of violation of blockade is not sufficiently conclusive to authorize seizure of the vessel if she is at the time bound toward an unblockaded port."

French Naval Regulations, 1912.

Article 19 of Declaration of London, 1909, substantially appears as Art. 100 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Contra.

"A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing, though she intend to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination. The *Circassian*, 2 Wall. 135."

Moore's Digest, vol. 7, p. 829.

"Where a neutral vessel, which had apparently set out on a lawful voyage, was captured, she was restored, the only evidence against her being that, when captured, she was out of the most direct and regular course, which was explained by the fact of there having been rough weather, which made it desirable for her to take the course she did. The *Sea Witch*, 6 Wall. 242."

Moore's Digest, vol. 7, p. 830.

"Where a clearance of a vessel expressed a neutral port to be her sole port of destination, but the facts showed that her primary purpose was to get cargoes into and out of a port under blockade, the outward cargo, if obtained, to go to the neutral port named as the one cleared for, the fact that the vessel's letter of instructions directed the master to call off the blockaded port and, if he should find the blockade still in force, to get the officer in command of the blockading ship to indorse on the vessel's register that she had been warned off (in accordance with what the owners of the vessel asserted to be their understanding of neutral rights under the President's proclamation of the 19th of April, 1861), and *then* to go to the port for which the clearance called, will not save the vessel from condemnation as prize, she having been captured close by the blockaded port, standing in for it, and without ever having made an inquiry anywhere whether the port was blockaded or not. The *Admiral*, 3 Wall. 603."

Moore's Digest, vol. 7, pp. 829, 830.

In the case of The *Imina* (1800) (3 C. Rob. 167, Scott, 776), a vessel sailed from Dantzick to Amsterdam, and while on voyage a blockade of Amsterdam was established. The *Imina* learned of this en route and accordingly changed her port of destination to a neutral port.

Sir William Scott in ordering restitution of vessel said: "I must ask then, was this property taken under such circumstances as make it subject to the penalty of contraband? Was it taken *in delicto*, in the prosecution of an intention of landing it at a hostile port?

Clearly not. But it is said, that in the understanding and intention of the owner it was going to a hostile port; and that the intention on his part was complete, from the moment when the ship sailed on that destination; had it been taken at any period previous to the actual variation, there could be no question but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* existing at the time of capture. In this point of view I think the case is very distinguishable from some other cases in which, on the subject of deviation by the master into a blockaded port, the court did not hold the cargo to be necessarily involved in the consequences of that act. It is argued that as the criminal deviation of the master did not there immediately implicate the cargo; so here the favorable alteration cannot protect it, and that the offence must in both instances be judged by the act and designs of the owner. But in those cases there was the guilty act, really existing at the time of capture; both the ship and cargo were taken *in delicto;* and the only question was to whom the *delictum* was to be imputed; if it was merely the offence of the master, it might bind the owner of the ship, whose agent he was; but the court held that it would be hard to bind the owners of the cargo by acts of the master, who is not *de jure* their agent, unless so specially constituted by them. In the present instance, there is no existing *delictum.* In those cases the criminal appearance, which did exist, was purged away by considering the owners of the cargo not to be necessarily responsible for the act of the master; but here there is nothing requiring any explanation: The cargo is taken on a voyage to a neutral port. To say that it is nevertheless exposed to condemnation on account of the original destination, as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this or the Superior Court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise."

In the *Gute Erwartung* (1805) (6 C. Rob. 182), a vessel on voyage to a non-blockaded port was captured for an alleged intent to violate the blockade of Havre. Her master claimed ignorance of the coast, that he was looking for a local pilot and that he had no intention to enter Havre.

In decreeing the condemnation of ship and cargo, Sir William Scott said: "If the situation of the vessel alone was to be considered, I should be disposed to acquiesce in this representation of his intentions, and to decree the vessel to be restored on payment of the captor's expenses.

"But there is an ulterior circumstance which presents a more unfavorable aspect. In the former case, [the *Charlotte Christina*, 6 C. Rob. 101], the vessel had continued her course close under the batteries, and was cut out, at some considerable risk and danger to the blockading vessel. In that case there was an illegal intention pursued to an illegal act, for a neutral vessel cannot be permitted so far to interfere with the exercise of a blockade, as to expose the force

maintaining it to the annoyance of the enemy's guns. In the present instance, the vessel was at the distance of near twenty miles; but the unfavorable circumstance to which I allude, places her, in construction of law, in the same situation, which the other vessel had actually reached. For the master says, 'that the course in which he was steering would have carried him directly to Havre, and that he should have continued in that course, though not into the port of Havre, but that he should have gone close under the land, and have taken a pilot for Caen.' Here, then, we perceive the same intention, and in the course of being pursued to the same illegal effect. How can this intention be considered as innocent? It had not been carried so far as in the other case, I acknowledge, but only because the vessel was interrupted before she had arrived at the spot where the other ship was actually taken. It is impossible that any blockade can be maintained, if such a practice is allowed, that a vessel, under a destination to a port not interdicted, shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries."

In the *Maria* (1805) (6 C. Rob. 201), Sir William Scott said: "This ship was taken on a voyage from Varel to America, having on board a cargo that had been sent from the Weser to the Jade, in lighters, and there transshipped. And it is contended that this being the carrying of goods sent expressly from Bremen, for the purpose of being exported, in the course of the foreign commerce of that port, would be a violation of the blockade which has been imposed on the river Weser. I have had frequent occasion to observe how severely the neutral cities connected with the Weser and the Elbe are pressed upon by the blockade of those rivers. At the same time it is my duty to apply to those operations of blockade, the principles that belong to that branch of the law of nations generally, and by which only such measures can be maintained. The principles themselves cannot differ, although it will undoubtedly be the disposition of the court to alleviate the situations of those towns as much as possible, by attending to any distinctions that can be advanced in their favor, not inconsistent with the sound construction of the general principles of law. A blockade imposed on the Weser must in its nature be held to affect the commerce of Bremen; because if the commerce of all the towns situated on that river is allowed, it would be only to say, in more indirect language, that the blockade itself did not exist. It cannot be doubted, then, on general principles, that these goods would be subject to condemnation, as having been conveyed through the Weser; and whether that was effected in large vessels or in small, would be perfectly insignificant. That they were brought through the mouth of the blockaded river, for the purpose of being shipped for exportation, would subject them to be considered as taken on a continued voyage, and as liable to all the same principles that are applied to a direct voyage, of which the *terminus a quo*, and the *terminus ad quem* are precisely the same, as those of the more circuitous destination. The case which has been referred to, is, in this respect, very different, because there the communication had been by inland navigation, which was in no manner, and in no part of it, subject to the blockade. If, therefore, nothing had passed between the government of this country and the city of Bremen, it appears to me that these goods would be subject to condemnation, and that I

should be unable to distinguish the port of Bremen from any other place liable to the general operations of a blockade."

The penalty in this particular case was not imposed for the reason that the blockade of the Weser had been relaxed in so far as it applied to innocent and neutral cargoes coming from Bremen.

"In The *Joseph* (1814), 8 Cranch, 451, the American brig *Joseph* sailed from Boston with a cargo of freight April 6, 1812, on a voyage to Liverpool, and the north of Europe, and thence directly or indirectly to the United States. She discharged her cargo at Liverpool; then, under British license, she took a cargo from Hull to St. Petersburg, and there received news of the war between the United States and Great Britain. She afterwards sailed from St. Petersburg to London with a cargo consigned to merchants at that port, having delivered which, she sailed for the United States in ballast, and was captured not far from Boston Light, and sent into port for adjudication. Her trading with the enemy rendered her liable to condemnation as prize; but it was contended that the offensive voyage terminated at London, and that she was not taken *in delicto*. The court held, however, that whether her voyage were considered an entire one from the United States to England, thence to St. Petersburg, and thence to the United States, or as two distinct voyages, the homeward voyage being from St. Petersburg to the United States, with a deviation to London, she was captured during the same voyage in which the offence was committed, though after it was committed, and was still *in delicto*."

The *Pedro*, 175 U. S., 354, 368.

In the *John Gilpin* (1862) (Blatch. 291), the court said that it "has had occasion, in more than one previous instance, to advert to the rule of the prize law which subjects neutral property to capture when attempting to violate a legal blockade. The offence is not consummated merely by the existence of a purpose to commit the act, but the vessel must be intercepted while endeavoring to carry out the guilty design. However earnestly the criminal intent may have been entertained and proceeded upon for a time, if it be really given up before the arrest, the property is not liable to confiscation because of the previous wrongful purpose. This is wholly a question of evidence, and, no doubt, a vessel setting out with the object of evading a legal blockade will be relieved from the penalty following her detection in seemingly adhering to that purpose in her doings, only upon clear evidence that at the time of capture the fraudulent and guilty intention had been wholly relinquished. (1 Kent's Comm., 147.) It is not the mere mental design which the law punishes, but the overt act, in starting for or proceeding towards the prohibited port, with the knowledge that it is blockaded, and continuing on that course up to the arrest. (Halleck's International Law, ch. 23, sec. 23, and citations.) Had this capture been made whilst the vessel was proceeding down the river from New Orleans, the vessel and cargo would have been, within the meaning of the rule, guilty of an overt act. They stopped, however, before leaving the port, waiting for authority to make the contemplated voyage, and returned to the place of departure, where they remained until arrested as prize. The cause of the seizure was not that the vessel and cargo were in the

act of evading the blockade, but was a cause not connected with that offence. I think, therefore, that on the facts and the law of the case that charge is not sufficiently proved to demand the condemnation of the vessel or cargo."

The *Cheshire* (1865) (3 Wall., 231) was a neutral vessel from Liverpool with papers showing a destination to either Nassau or Halifax. She was captured off Savannah for breach of blockade of that port, her master claiming that he had instructions to put into Savannah in case he found that port not blockaded.

In sustaining the condemnation of the vessel by the lower court, the Supreme Court said: "The intention to break the blockade is to be presumed from the position of the ship when captured. She knew of the blockade when she sailed from Liverpool; she had no just reason to suppose it had been discontinued; her approach, under these circumstances, to the mouth of the blockaded port for inquiry was itself a breach of the blockade, and subjected both vessel and cargo to seizure and condemnation. The rule on this point is well settled, and is founded in obvious reasons of policy. If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade; the liberty of inquiry would be a license to attempt to enter the blockaded port; and that information was sought would be the plea in every case of seizure. With a liberty of this kind the difficulty of enforcing an efficient blockade would be greatly augmented. If information be honestly desired, it must be sought from other quarters. In the case of the *James Cooke* [Edw., 263], the ship was captured at the entrance of the Texel, and the court applied this rule, observing that the approach of the ship to the mouth of a blockaded port, even to make inquiry, was, in itself, a consummation of the offence, and amounted to an actual breach of the blockade."

In the *Bermuda* (1865) (3 Wall. 514) the court said:

"The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene.

"This was distinctly declared by this court in 1855 [Jackson *v.* Montgomery, 18 How., 114] in reference to American shipments to Mexican ports during the war of this country with Mexico as follows:

'Attempts have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and the ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation.'"

The *Springbok* (1866) (5 Wall. 1) was a neutral vessel captured while on a voyage from one neutral port to another. Her papers were regular and genuine. The master claimed ignorance of the real ownership of the cargo. The bills of lading disclosed the contents of only about one-third of the packages making up the cargo, and there was evidence that tended to connect the ownership of the cargo with parties engaged in blockade running from Nassau, the port of

destination of the *Springbok*. In addition there was a vessel at Nassau with the undenied intention of running the blockade of the Southern coast to which vessel the evidence disclosed a purpose to transfer the cargo of the *Springbok*.

On this statement of facts the court condemned the cargo and released the vessel saying: "Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be trans-shipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."

Twiss in his Belligerent Right on High Seas, pp. 23–31 has the following criticism to offer to the decision of the Supreme Court in the case of the *Springbok:*

"Of the four propositions above stated, the two first are findings of fact, and the two latter are statements of law. We pass over the former as having no general application. It is with the statements of law that neutral Nations are seriously concerned, for the theory of Continuous Voyages applied to blockades, after the precedent of the *Springbok*, would amply justify a powerful belligerent in sweeping the wide ocean clear of neutral merchant ships, as soon as it has declared an enemy's coast to be under blockade. We have already remarked that during the late Civil War the Government of the United States declared the whole of its coasts, to the extent of three thousand miles, to be under blockade, and the Supreme Court did not consider itself bound to fix the owners of the cargo on board the *Springbok* with an intention to re-ship it for any particular blockaded port, but generally for some port or other under blockade. Let us suppose, what we hope may not happen, that France should become openly at war with China, and should declare the entire Chinese sea-coast to be under blockade. France as a Belligerent Power might claim a right upon the precedent of the *Springbok* to seize every British or Dutch merchant ship passing along the Tunisian coast of the Mediterranean on its way to the Suez Canal, and although a French Prize Court might be satisfied upon an examination of the papers on board the ship, that the ship itself was bound to the neutral port of Singapore or of Hong Kong, it might surmise upon extraneous information that the cargo, after it had been discharged at the port of the ship's destination, was intended to be re-shipped in some other vessel, say a German vessel, (for German ships have at present a large share of the carrying trade between Hong Kong and the Chinese ports), and to be forwarded to a blockaded port. Upon such a surmise, if the judgment of the Supreme Court of the United States, in the case of the cargo of the *Springbok*, is to be accepted as a precedent, a French Prize Court would be justified in confiscating the cargoes of all such captured vessels, although it decreed the release of the vessels themselves.

"A question naturally suggests itself on looking at the finding of the Supreme Court as to the destination of the ship, and as to her

papers being all regular and genuine, how we are to account for the seizure of the vessel in disregard of the Instructions issued by order of the President of the United States and communicated by the Secretary of State to the British Chargé d'Affaires at Washington.

"A document has recently been published, which throws light on the true grounds of the seizure of the *Springbok*. It seems that his Excellency Lord Lyons, the British Minister Plenipotentiary at Washington, made a representation to the American Government relative to the capture of the *Springbok*, and that Mr. Seward, the U. S. Secretary of State, in his reply of 25th March, 1863, stated that, according to a brief report made to the Navy Department of U. S., it appears that the *Springbok* had been seized 'because she had no proper manifest, and nothing to show the character of her cargo, which the captain of the vessel said he was ignorant of.' A recent publication has disclosed the fact that the U. S. Secretary of State was misinformed on this occasion, for the official dispatch, in which the commander of the *Sonoma* reported to the U. S. Secretary of the Navy that he had captured the *Springbok*, gives quite another account of the grounds of capture. We quote the despatch from 'Le Mémorial Diplomatique' of Saturday, 9th June, 1883:

"'U. S. S. *Sonoma*.

"'February 3d 1863.

"'At sea, lat. 25° 35′ North, long. 73° 40′ West.

"'To the Honble. Secretary of the Navy.

"'Sir,—I have the honor to inform you, while cruising for the *Oreto*, I have this day captured in lat. and long. as above mentioned, the English barque *Springbok*, one of the vessels designated as a contraband loader upon the list furnished me by Rear-Admiral Wilkes.

"'I send the *Springbok* to New York in charge of Acting-Master Willis.

"'Very respectfully, your obdt. servt,

(Signed) "'T. H. Stevens, Commander U. S. Navy.'

"An explanation of the allusion in this letter to a list of vessels furnished to Commander Stevens by Rear-Admiral Wilkes is probably forthcoming in a paper communicated by the Hon. Charles Francis Adams, the United States Minister in London, to Earl Russell on 30th December, 1862, which has been published as part of the correspondence respecting the *Alabama*, laid before the British Parliament. (North America, No. 3, 1883.) It appears from this paper that Mr. Morse, the United States Consul-General in London, had compiled a list of vessels 'which he believed could be relied on as being a part of those which had left the port of London laden with supplies, principally contraband of war.' The list in question, known subsequently by the familiar name of the *Black List*, contains the names of twenty-two vessels of which twenty are steam-vessels and two are sailing vessels, the last on the list being the sailing vessel *Springbok*, respecting which no particulars beyond her name are given. The circumstance that the name of the *Springbok* had been inserted on this list, if it be assumed that a copy of it was furnished

to the Commander of the United States cruiser *Sonoma*, might have warranted him in suspecting her papers to be simulated and false, and in sending the vessel into port for further enquiry; but the Supreme Court of the United States, after having kept the question before it during three entire years, and having had the case twice argued before it, came to the conclusion that the *Springbok's* papers were neither simulated nor false, and that the true destination of the *Springbok* was Nassau a neutral port in New Providence, and with regard to the cargo being principally contraband of war it was found to consist almost entirely of general merchandize not suitable for purposes of war. I do not propose to discuss the facts proved in evidence before the Supreme Court; it may be sufficient to say that the cargo of the *Springbok* appears to have been condemned in consequence of a suspicion, which had been raised in the mind of the Court by extraneous information, that it was intended, as matter of fact, to be transhipped at Nassau and to be forwarded in another vessel to some blockaded port.

"The Court, on this suspicion, held itself to be justified under the circumstances under which that suspicion had arisen, in ruling that the surmised ulterior voyage of the cargo was both in law and in the intent of the parties one voyage with the actual voyage in which it was captured from London to Nassau, and that a liability to condemnation, if the vessel was captured during any part of the voyage from London to Nassau, attached to the cargo from the time of sailing.

"Such a severe exposition of the Law of Blockade is not to be found on record in any reported Judgment of the European Prize Courts, and it is not too much to say that it has added a *new terror to war* as regards neutral commerce, and has also introduced a new *ratio decidendi* into Prize proceedings, to which other nations may with justice demur.

"In the particular case of the *Springbok*, it is well known that the Judges of the Supreme Court were not unanimous, and that three of them at least dissented from the opinion of the majority. Further, it has been stated, in a letter from the late Honourable Samuel Nelson, one of the associate Judges who heard the appeal, addressed to the distinguished American Jurist, Mr. W. Beach Lawrence, the learned Editor of 'Wheaton's Elements of International Law,' who disapproved of the judgment, 'that the Supreme Court was not familiar with the Law of Blockade at the time when the appeal in the case of the *Springbok* came before it,' and that the minds of several of the Judges were warped by patriotic sentiments and by resentment against England. In fact, public feeling was at that time strongly excited in the United States by the depredations of the Confederate privateers, and the Judges, as individual citizens, were no exception to that feeling. Such a confession does honour to the Associate Judge, and relieves the Supreme Court of any possible suspicion that might otherwise have attached to it, that it conceived it to be its duty, as a Court of Prize, to support the action of the Navy of the United States, even if it should be guilty of excessive vigilance and overzealous exercise of belligerent right in carrying out its Instructions under the emergencies of a Civil War. On the other hand, the Executive Government of the United States

has always avowed a readiness on its part to redress any grievance resulting to neutral commerce from the decision of its Prize Courts, if the circumstances appear to call for it. The case of the *Adela* may be cited, in which the Hon. W. Seward, the United States Secretary of State, thus expressed himself in a note addressed to the Hon. W. Stuart, the British Chargé d'Affaires at Washington, on 27th September, 1863:—'If the principles of Maritime Law shall finally be decided against the claimants, due reparation therefor shall be made. The Government has no disposition to claim any unlawful belligerent rights, and will cheerfully grant to neutrals, who may be injured by the operations of the United States forces, the same redress which it would expect, if the position of the parties were reversed.' These are noble words, worthy of the Representative of a Great Nation, which can afford to be both generous and just.

"It is not an unimportant fact to which the Government of the United States may justly attach some weight, that the members of a Commission of the Institute of International Law, appointed to consider the subject of Maritime Prize, have concurred in a Consultation on the subject of the condemnation of the cargo of the *Springbok*, in which, having expressed their opinion that the application of the theory of Continuous Voyages to the cargo of that vessel was a retrograde step calculated to aggravate the shackles (entraves) imposed upon neutral commerce in time of war, they observe that its effect as regards the law of blockade will be to convert every neutral port, to which a neutral cargo may have been despatched, into a port *blockaded by interpretation*, as soon as there may be motives to suspect that the cargo having been discharged at that port may be reladen in another vessel and forwarded to a port actually blockaded. It were much to be desired, is the concluding paragraph of the Consultation, that the Government of the United States of America, which has been the zealous promoter of several ameliorations in the rules of maritime warfare in the interest of neutrals, should take an early opportunity, in such form as it shall deem most suitable, to declare that it does not intend to accept and consecrate the theory, formulated as above, as an element of its maritime jurisprudence in matters of prize, nor as a rule of international law binding in future on its Prize Courts.

"Since I took up my pen to review the progress made during the last thirty years in rendering war less onerous to neutrals, a debate has taken place in the Upper Chambers of the States General of the Netherlands on the subject of the condemnation of the cargo of the *Springbok* with a view to prevent the doctrine, upon which the Supreme Court of the United States justified its decision, from being generally accepted in European Prize Courts. Count van Lynden van Sandenburg, Minister of State, in the Sitting of the Upper Chamber of the States General on Friday, 25th January, 1884, in the course of his speech, in which he set forth the history of the capture and release of the vessel and the condemnation of her cargo, stated that he knew that the attention of several Powers is now directed to the question, which has at length assumed an *international* character, seeing that it vitally affects neutral rights. 'It matters not,' he said, 'who the owners of her cargo may be, to what nationality they may belong, whether they are English, French, Dutch, or even American.

A great principle is at stake, and the only satisfactory and conclusive proof that the United States Government can give, that it at length abandons and renounces a doctrine destructive of neutral trade, and a judgment pronounced in error, will be the awarding full compensation to the despoiled owners of the cargo, the long-suffering victims of a flagrant mis-carriage of justice. Now is it not,' he continued, 'the clear course, is it not the duty of the Netherlands Government, of the government of the country, which gave birth to Hugo Grotius, to approach the United States of North America in conjunction with other maritime Powers, for the purpose of prevailing on their Government to retrace its steps. In my opinion it is clearly our duty.'

"Herr Van der Does de Willebois, the Netherlands Minister of Foreign Affairs, in his reply, stated that the Netherlands Minister at Washington had already been instructed to take every opportunity to press earnestly the subject on the American Government.

"In conclusion, I may add that the countrymen of Benjamin Franklin may fitly lend an ear to the countrymen of Grotius. Europe has listened to the counsels of Benjamin Franklin, who in his letter of 14th March, 1783, quoted in the instructions sent by Mr. Adams, Secretary of State in 1823, to Mr. Rush, the Minister of the United States in London, was the first to set in motion the idea 'that it was high time, for the sake of humanity, to put a stop to the enormity of private war upon the sea.' The Dutch, on the other hand, were the first nation in Europe to regulate the practice of blockade, and with that object in view they issued an ordinance on 26th June, 1630, upon the advice of their Courts of Admiralty, requiring three things to be proved before a neutral vessel should be confiscated with its cargo by sentence of the said Courts—namely (1), the existence of a blockade *de facto;* (2), the notoriety of such a blockade; (3), a clear intention to violate the blockade.

"The Dutch nation has thus an hereditary title as it were to raise its voice against the theory of Continuous Voyages being ingrafted on the law of blockade, seeing that it would result in a general license to Prize Courts to hold any neutral port to be a *port blockaded by interpretation.* It may be presumed that the Judges of the Supreme Court of the United States did not foresee the wide scope of interference with neutral commerce, which *the doctrine of blockade by interpretation* would authorize, and that they overlooked the fact that no evidence can in the nature of things be forthcoming in the ship's-papers or in the cargo-papers to refute a suggestion of a possible reshipment of the cargo on board of another vessel destined to a blockaded port, after it has been delivered at the port of the ship's actual destination. Besides it is an axiom of Maritime Prize Law, that with regard to the cargo on board of a general ship the Manifest and the Bills of Lading are the best evidence of both the ownership and the destination of the cargo."

In the *Peterhoff* (1866) (5Wall. 28, 54), the court had before it the question of whether a vessel en route to a neutral port, with a cargo that had an ulterior enemy destination, was liable for breach of a blockade.

The court said: "It is an undoubted general principle, recognized by this court in the case of The *Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

"The question now is whether the same consequence will attend an ulterior destination to a belligerent country by inland conveyance. And upon this question the authorities seem quite clear.

"During the blockade of Holland in 1799, goods belonging to Prussian subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for trans-shipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden, and the cause came before the British Court of Admiralty in 1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. 'It was,' said Sir William Scott, 'a mere maritime blockade effected by force operating only at sea.' He admitted that such trade would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed, 'If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing which will not admit a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied * * * It must be presumed that this was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable.'

"The same principle governed the decision in the case of The *Ocean*, made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam, and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

"These were cases of trade from a blockaded to a neutral country, by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of the *Jonge Pieter*, adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam, were held not liable to seizure for violation of the blockade of that port. The particular goods in that instance were condemned upon evidence that they did not in fact belong to neutrals, but to British merchants, engaged in unlawful trade with the enemy; but the principle just stated was explicitly affirmed.

"These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation. They assert principles without disregard of which it is impossible to hold that inland trade from Matamoras, in Mexico, to Brownsville or Galveston, in Texas, or from Brownsville or Galveston to Matamoras, was affected by the blockade of the Texan coast.

"And the general doctrines of international law lead irresistbly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents: the first is that there must be no violation of blockade or siege; and the second, that there must be no conveyance of contraband to either belligerent. And the question we are now considering is, 'Was the cargo of the *Peterhoff* within the first of these exceptions?' We have seen that Matamoras was not and could not be blockaded; and it is manifest that there was not and could not be any blockade of the Texan bank of the Rio Grande as against the trade of Matamoras. No blockading vessel was in the river; nor could any such vessel ascend the river, unless supported by a competent military force on land.

"The doctrine of The *Bermuda* case, supposed by counsel to have an important application to that before us, has, in reality, no application at all. There is an obvious and broad line of distinction between the cases. The *Bermuda* and her cargo were condemned because engaged in a voyage ostensibly for a neutral but in reality either directly or by substitution of another vessel, for a blockaded port. The *Peterhoff* was destined for a neutral port with no ulterior destination for the ship, or none by sea for the cargo to any blockaded place. In the case of the *Bermuda*, the cargo destined primarily for Nassau could not reach its ulterior destination without violating the blockade of the rebel ports; in the case before us the cargo, destined primarily for Matamoras, could reach an ulterior destination in Texas without violating any blockade at all.

"We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.

"Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence.

"The remedy for inconveniences of the sort just mentioned is with the political department of the government. In the particular instance before us, the Texan bank of the Rio Grande might have been occupied by the national forces; or with the consent of Mexico, military possession might have been taken of Matamoras and the Mexican bank below. In either course Texan trade might have been entirely cut off. Sufficient reasons, doubtless, prevailed against the adoption of either. The inconvenience of either, at the time, was doubtless supposed to outweigh any advantage that might be expected from the interruption of the trade.

"What has been said sufficiently indicates our judgment that the ship and cargo are free from liability for violation of blockade."

In the case of The *Pearl* (1866) (5 Wall. 574), a neutral vessel was captured while on her way from one neutral port to another. The evidence showed that her port of destination was notoriously used as

a base for blockade runners, and that the parties to whom the vessel and cargo were consigned were well known to be engaged in blockade running.

The Supreme Court condemned both vessel and cargo, saying: "We perceive no reasonable ground for believing that the *Pearl* was not at the time of capture destined to employment in breaking the blockade. We are not satisfied that her voyage was to terminate at Nassau; but are satisfied, on the contrary, that she was destined, either immediately after touching at that port, or as soon as practicable after needed repairs, for one of the ports of the blockaded coast."

In the case of the *Olinde Rodrigues* (1898) (174 U. S. 510, Scott, 835), it was said that "the evidence of the ship's officers being explicit that the vessel was on her way to St. Thomas," a neutral port, "and had no intention of running into San Juan," a blockaded enemy port, "the decree in her favor must be affirmed on the merits, unless the record elsewhere furnishes evidence sufficient to overcome the conclusion" that she did not intend to violate the blockade.

In the case of the *Pedro* (1899) (175 U. S. 354), the Supreme Court referred in the following language to the prior decisions of the court on the liability to capture of a vessel where her ulterior destination is a blockaded port, regardless of the fact that her immediate destination may be a neutral port:

"In The *Circassian*, 2 Wall. 135, it was ruled that the intent to violate a blockade, found as a fact, was not disapproved by evidence of a purpose to call at a neutral port, not reached at time of capture, with ulterior destination to the blockaded port. In The *Bermuda*, 3 Wall. 514, the actual destination to a belligerent port, whether ulterior or direct, was held to determine the character of the transaction as a whole; that tran-shipment could not change the effect of the pursuit of a common object by a common plan; and that if the cargo was contraband its condemnation was justified, whether the voyage was to ports blockaded or to ports not blockaded; and so as to the vessel in the former case. And in The *Springbok*, 5 Wall. 1, it was held that an intention to tran-ship cargo as a neutral port did not save it when destined for a blockaded port; that as to cargo, both in law and intent, the voyage from London to the blockaded port was one voyage, and that the liability attached from the time of sailing if captured during any part of that voyage. The solution of the question under consideration is not particularly aided by these and like decisions relating to blockade running and the transportation of contraband."

The *Sishan* (1904) (2 Russ-Jap. P. C. 174), a neutral steamer during the Russo-Japanese war of 1904 cleared at Hong-Kong for Newchwang with a cargo of "provisions appropriate for military use." Her voyage carried her close to Port Arthur, which was under blockade by the Japanese naval forces. There was considerable evidence that the steamer intended to run the blockade if conditions were found to be favorable. She was, however, unable to elude the blockading fleet and accordingly proceeded to the port of destination shown in her papers. At Newchwang she attempted to clear for Chefoo, a voyage that would likewise take her close to Port Arthur, the evidence being that she again proposed to run the blockade if

practicable. Before leaving Newchwang she was boarded and captured by a Japanese naval vessel and sent in to Sasebo for condemnation.

The Prize Court released her, holding that "it must be concluded that the ship at the time of her arrival at Newchwang had abandoned her first project of running the blockade * * * even if she had had such a project, she did not carry it out and actually made the voyage mentioned in her papers." Nor can she, on account of her alleged purpose on the proposed voyage to Chefoo, "be held guilty of attempting to break blockade * * *, for, even if she had any such intention, she did not begin to carry it out."

The *Fuping* (1904) (2 Russ-Jap. P. C., 177) was a neutral steamer that, during the Russo-Japanese war of 1904, cleared from Taku with Chefoo as her ostensible destination. She had on board an enemy army officer, a quantity of paper currency destined for the enemy, and a cargo of military supplies. She was captured by a Japanese naval vessel while off her regular course and about 40 miles from the blockaded port of Port Arthur.

The court condemned her as good prize, saying that "it is a general rule of International Law that if while a blockade is effective a vessel be found in the neighborhood of the blockaded area and clearly proceeding toward it, she may be considered as having broken the blockade."

The *Veteran* (1905) (2 Russ-Jap. P. C. 190) was a neutral steamer that left Tsingtau in November, 1904, ostensibly for Newchwang. She had on board a miscellaneous cargo of articles urgently needed at Port Arthur, which was under blockade at the time by the Japanese naval forces. Before leaving port she had been repainted a color that would make it difficult to discern her at sea. After leaving, the ship's bell was removed, and the following night the ship's course was changed toward Port Arthur. Early in the morning, when about seventy miles off Port Arthur, she was captured by a Japanese naval vessel, taken into port and condemned.

On appeal the Higher Prize Court of Japan, in sustaining this condemnation, said:

"The first argument of the appellant is that whereas the P. C. found that the mere fact that the vessel suddenly changed her course off Wei-hai-wei and proceeded north-east was proof of her intention to run the blockade and make for Port Arthur, there were no grounds for this conclusion." However the repainting of the vessel a peculiar color, the taking down of the ship's bell, the attempt of the vessel to elude the Japanese naval vessel, and her manifest change in course are facts alone "more than enough to support the conclusion that the vessel, even before her change of course, was secretly proceeding towards Port Arthur, otherwise, if she had no idea of running the blockade, there would have been no need for flight, and certainly none for a change which might almost be called a reversal of her course. * * *

"The second argument of the appellant was that, as the place of capture was about 70 nautical miles from the line of blockade, it was impossible to conclude that the ship intended to pass the line of blockade and enter the port, and that the capture was an abuse of preventive rights, as Article 29 (1) of the Regulations relating

to Capture at Sea does not apply. It was also argued that, even assuming the blockaded port to have been the objective, where the distance of the place of capture from the port was as great as in this case, there was ample opportunity for a change or suspension of the intention, and according to the true principle of International Law, the intention should be left out of the consideration. But at the time the blockading vessels were stationed about 10 nautical miles from the coast, and cruising still further out in the fulfillment of their duties, as is evident from the fact that this vessel was discovered by the squadron which was maintaining the blockade by cruising some 30 nautical miles south of Round Island (Yuan-tao), which is itself 22 nautical miles from the coast. Thus the place of capture may be regarded as in the neighborhood of the blockaded area, and the '*Veteran*' was therefore clearly engaged in breaking the blockade, so that the second point of the appeal is also groundless.

"Moreover, since International Law recognizes that a ship that is making an attempt to break the blockade may be captured, the third point of the appeal is also groundless."

In the case of the *King Arthur*, a vessel condemned for violation of the blockade of Port Arthur, although her papers showed that she was on a voyage to a neutral port and was not to enter the blockaded port, the Higher Prize Court of Japan, (1905) (2 Russ-Jap. P. C. 217), said:

"The period during which navigation is habitually stopped at Newchwang commences between November 27th and December 6th, and this vessel left Bombay on November 8th. Her greatest speed according to the records is about 7½ knots, and even if she had proceeded direct, without calling at any port and without any breakdown in her engines, about 29 days would be required for the voyage by the shortest route between Bombay and Newchwang, 5,250 nautical miles, and the vessel's arrival at Newchwang would necessarily have been subsequent to the stoppage of navigation. It is absolutely incredible that under such circumstances it was intended to import into Newchwang a large quantity of flour which had not been ordered, and, moreover, from the fact that the vessel reached a spot 5 or 6 nautical miles off Lao-tieh-shan, which was not on the ordinary route to Newchwang, it may be inferred that the vessel's destination was not Newchwang. The appellant's statement in the written reasons for appeal that the vessel's departure in a greater or less degree from the ordinary route was the result of damage to the engines, which diminished her steaming power, and his statement, when examined as master, that it was caused by the drift of currents, the helmsman's lack of skill, and an error in the compass, are contradictory, and amount to no more than excuses quite unworthy of reliance."

VESSEL LIABLE TO CAPTURE FOR BREACH OF BLOCKADE REMAINS SO LIABLE SO LONG AS PURSUED BY BLOCKADER, UNLESS IN MEANTIME BLOCKADE IS RAISED.

A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.—*Article 20, Declaration of London, 1909.*

"A vessel has left the blockaded port or has tried to enter it. Shall she remain indefinitely liable to capture? To reply by an absolute affirmative would be to go too far. This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; it would not be enough for her to be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is one of fact; it is not enough that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended, but not abandoned. Capture is no longer possible when the blockade has been raised."

General report of drafting committee to London Naval Conference.

"As regards article 25 [Art. 20 of the final draft], the delegation, while believing that the article could advantageously be combined with article 24 [Art. 17 of the final draft] so as to deal with the question of blockade as a whole, accepts the article under the reservation that pursuit is considered as continuous and not abandoned, in the meaning of the article, even though it should be abandoned by one line of the blockading force to be resumed after a while by a ship of the second line until the limit of the radius of action shall have been reached. Under certain conditions there may even be several lines, each one with its respective pursuit zones."

Statement of the delegation of the United States to the London Naval Conference regarding the pursuit of ships in cases of blockade running.

Contra.

"'To justify a capture for the violation of a blockade,' says Duer, [On Insurance, vol. 1, pp. 688, 689] 'or the attempt to violate it, the offense must continue to exist at the time of seizure. In technical language, the ship must be then *in delicto*. In cases where the ship has violated the blockade by egress, the *delictum* continues during her whole voyage, till she has reached her final port of destination. Until then, as the offense consists, not in the mere attempt, but in an actual breach, no change of circumstances, or subsequent repentance, can efface the guilt. It is not cancelled by a mere interruption of the voyage, such as the stopping of the ship at an intermediate

port, either from necessity or design; when she resumes her voyage, she becomes again subject to the penalty of the law. But when a ship sails for a blockaded port, with a knowledge of the blockade, and the intention to violate it, the offense is so far complete as to justify her immediate capture; yet, as it exists only in an attempt, the *delictum* does not necessarily continue during the whole of her subsequent voyage. If, previous to her capture, the blockade had ceased to exist, or the master, from the information of a ship of war of the blockading state, had just grounds for believing that such was the fact, or had altered his destination, with the intention of not proceeding at all to the blockaded port, the offense no longer exists, and that which had existed is no longer punishable. To constitute the offense, three circumstances must be found to coëxist. The fact of a blockade, the party's knowledge of its existence, and his intention to violate it, and in each of the above cases, an indispensable circumstance is wanting. The *delictum*, therefore, at the time of capture, had wholly ceased, and both ship and cargo will be restored.'"

Halleck, p. 565.

"Blockade is only a competition of diligence and force over waters either free to all, or within national jurisdiction, as it may be: and, if the blockade-runner gets in or escapes, he cannot be afterwards treated as having violated a jurisdictional right."

Wheaton, Dana's Note 233, p. 675.

The 3d article of the edict of the States-General of Holland of 1630, relating to the blockade of the ports of Flanders provided for the confiscation of vessels and cargo coming out of ports of Flanders, "although they should be captured at a distance from them, unless they had, after leaving the enemy's port, performed their voyage to a port of their own country, or to some other neutral or free port, in which case they should be exempt from condemnation; but if, in coming out of the said ports of Flanders, they should be pursued by the Dutch ships of war, and chased into another port, such as their own, or that of their destination, and found on the high seas coming out of *such port*, in that case they might be captured and condemned. Bynkershoek considers this provision as distinguishing the case of a vessel having broken the blockade, and afterwards terminated her voyage by proceeding voluntarily to her destined port, and that of a vessel chased and compelled to take refuge; which latter might still be captured after leaving the port in which she had taken refuge. And in conformity with these principles is the more modern law and practice."

Wheaton, p. 684.

"The penalty for a breach of blockade is remitted, by the raising of the blockade, between the time of sailing from the port and the capture. When the blockade is raised a veil is thrown over everything that has been done and the vessel is no longer taken *in delicto*. The *delictum* completed at one period is, by subsequent events, entirely done away. The *Lisette* (1806), 6 Rob. 387."

Wheaton's Note to Olivera *v.* Union Insurance Company, 3 Wheat., 199.

Contra.

"The penalty for a breach of blockade is held to continue upon a vessel until the end of her return voyage, and to have ceased, if she were captured after the actual discontinuance of the blockade. The reasons for the former rule may be that the voyage out and back is fairly looked on as *one transaction*, the return freight being the motive in part for the act, and that time ought to be allowed to the blockading vessels to pursue and capture the offender. The reason for the latter is, that the occasion for inflicting the penalty ceased with the blockade."

Woolsey, p. 351.

Contra.

"A vessel which has succeeded in effecting a breach of blockade is not exonerated by her success from the consequences of her illegal act. If a ship that has broken a blockade is taken in any part of the same voyage, she is taken *in delicto;* the offence is not terminated until she reaches the end of the voyage, and the voyage is understood to include her return; on this point, the breach having been in fact committed, the French doctrine can be, and perhaps is, in unison with that of England. If the blockade is raised during the voyage, the liability to capture comes to an end, the existence of the offence being dependent on the continuance of the state of things which gave rise to it."

Hall, p. 736.

Difference Between Continental and Anglo-American Practice.

"It is universally recognised that a vessel may be captured for a breach of blockade *in delicto* only, that means, during the time of an attempt to break it, or of the breach itself. But here again practice as well as theory hitherto have differed much, since there has been no unanimity with regard to the extent of time during which an attempt of breach and the breach itself could be said to be actually continuing.

" * * * it has been a moot point from what moment a breach of blockade could be said to have been attempted, and that according to the practice of Great Britain and the United States an attempt was to be found in the fact that a vessel destined for a blockaded port was starting on her voyage. It is obvious that the controversy bore upon the question from what point of time a blockade-running vessel must be considered *in delicto.*

"But it has been likewise a moot point as to when the period of time during which a blockade-running vessel might be said to be *in delicto* came to an end. According to Continental theory and practice, such vessel was considered to be *in delicto* only so long as she was actually on the line of blockade, or, having fled from there, so long as she was pursued by one of the blockading cruisers. On the other hand, according to the practice of Great Britain and the United States, a blockade-running vessel was held to be *in delicto* so long as she *had not completed her voyage from the blockaded port to the port of her destination and back to the port from which she started originally*, the voyage out and home being considered one

voyage. But a vessel was held to be *in delicto* so long only as the blockade continued, capture being no longer admissible in case the blockade had been raised or had otherwise come to an end.

"The Declaration of London, when ratified, will settle the controversy, for, according to article 20, a vessel is *in delicto* so long only as she is pursued by a man-of-war of the blockading force, and she may no longer be captured if the pursuit is abandoned or if the blockade is raised. Stress must be laid on two points. Firstly, the pursuit must be carried out by a man-of-war belonging to the blockading force, and not by any other cruiser. Secondly, a blockade-breaking vessel is liable to capture so long as the pursuit lasts, whether or no she is still within the area of operations; even if for a while she has taken refuge in a neutral port, she may, on coming out, be captured, provided the captor is one of the men-of-war of the blockading force which pursued her and waited for her outside the port of refuge."

Oppenheim, vol. 2, 475, 476.

Difference Between Continental and Anglo-American Practice.

"The time during which a vessel which has broken a blockade by egress, whether she was in the port at the commencement of the blockade or had entered that port by a successful breach of it, may be captured with condemnation as the result, is subject to a difference between the Anglo-American and the continental schools analogous to that which we have seen to exist as to the commencement of the liability for a breach by ingress. Those who hold that a blockade can only be maintained by a stationary squadron restrict to that squadron the right of vindicating a breach of it. A ship of that squadron may pursue the blockade-runner who has succeeded in passing its line to any distance compatible with the maintenance of the blockade by the remainder of the force, but when he has once entered a neutral port the affair is closed and he is free. The opposite school allows any ship of war, whether she has or not been a member of the blockading squadron, to capture the offender at any distance from the blockaded port until his destined voyage is ended, supposing always that the blockade is really in existence at the time of the capture. In the opinion of that school the blockade-runner has not got rid of his culpability, deposited it as the phrase is, by entering a neutral port not that of his destination in order to escape pursuit or under stress of weather. On his leaving it the chase can be renewed or taken up by some other ship."

Westlake, vol. 2, p. 271.

Contra.

"ART. 137. So long as the Blockade continues, the Vessel which has committed a Breach remains liable until she has completed her voyage from the Blockaded Port to her Port of Destination.[1] What is her Port of Destination is a matter which has to be determined by the Commander of the Cruiser upon a consideration of all the circumstances. Usually the Port of Destination is that named in the Charter-party as the port for which the Vessel is bound, even though

[1] "*Weelvaart van Pillau*, 2 C. Rob. 128. *General Hamilton*, 6 C. Rob. 61. *Randers Bye*, cited in Christiansberg, 6 C. Rob. 382 n."

she may touch at any intermediate port for the purpose of loading or unloading, or under stress of weather."

Naval Prize Low, Holland.

"ART. 140. The moment the Blockade is raised, a Vessel ceases to be liable to capture for any previously-committed Breach of Blockade; though, if already captured, she is not to be released."

Naval Prize Law, Holland.

"Art. 44. The liability of a vessel purposing to evade a blockade, to capture and condemnation, begins with her departure from the home part and lasts until her return, unless in the meantime the blockade of the port is raised."

United States Naval Code, 1900.

"ART. 27. Ships coming under the following categories shall be held to have committed a breach of blockade outwards:—

"1. A ship escaping outwards from the blockaded area or trying to do so.

"2. A ship which being outside the blockaded area takes on board, or tries to take on board, cargo from a ship which has committed a breach of blockade outwards."

Japanese Regulations, 1904.

"ART. 28. In cases where a ship comes under any one of the following clauses the provisions of the preceding article shall not apply:—

"1. When a ship leaves the blockaded area outward bound with the special permission of the Imperial Government, or of the commander of the blockading fleet or warship.

"2. When a ship which has entered port during the blockade without having received notice of its establishment leaves port without a cargo.

"3. When a ship which was within the blockaded area at the time of the establishment of the blockade leaves port without a cargo.

"4. When a ship which had taken cargo on board within the blockaded area before the establishment of the blockade leaves port."

Japanese Regulations, 1904.

"ART. 29. A ship which, having received notice of the blockade, comes under any one of the following clauses shall be held to have committed a breach of blockade inwards:—

"1. A ship which, having crossed the line of blockade, enters the blockaded area, or tries to do so.

"2. A ship which, whatever the destination given in her papers may be, is in the neighborhood of the blockaded area, and is for good reason considered to be directing her course towards the interior of that area.

"3. A ship which, while outside the blockaded area, transships her cargo to another, and by causing that other to cross the line of blockade, assists in carrying the said cargo inside the blockaded area, or tries to do so.

"4. A ship which sails with the blockaded port as her destination."

Japanese Regulations, 1904.

"ART. 30. In cases where a ship comes under any one of the following clauses, the provisions of the preceding Article shall not apply:—

"1. When a ship has received the special permission of the Imperial Government, or of the commander of the blockading fleet or warship.

"2. When the master of a ship, hoping to have the good luck to find the blockade raised, and with the intention of changing his destination should this not be the case, makes the blockaded port his destination, and it is considered that there is a reason for leniency on account of the fact that the ship has sailed from an exceedingly remote locality.

"3. When it is clear that the master of a ship has already abandoned his intention of making the blockaded port the ship's destination.

"4. When, on account of bad weather, lack of provisions or other unavoidable causes, the necessity arises for a ship to put into port, and there being no other port or bay at which she can call, she enters the blockaded area."

Japanese Regulations, 1904.

"3. * * * The right of capture may also be no further exercised when a merchant vessel during the course of pursuit or while under visit and search reaches the waters referred to in *a*—[within neutral waters, i. e. within a sea area three sea miles wide, measured from low water coast line, bordering the coast and the islands and indentations appertaining thereto. As appertaining are:—Islands which are no farther than six miles distant from one of the mainland coasts of the same state; indentations whose coast is exclusively in the possession of the neutral state and whose opening is six sea miles or less wide]—and *b*—[within those waters which are by convention closed to operations of war or to ships of war—these are: The Suez Canal * * *; The Bosporus and the Dardanelles * * *; The waters of Corfu and Paxo * * *; The mouths of the Danube * * *; The mouths of the Congo and Niger * * *].

"A ship seized in violation of the foregoing provisions is to be released immediately, especially at the request of the neutral Government."

German Prize Rules, 1909.

"78. A ship that has committed a breach of blockade is liable to capture so long as it is pursued by one of the ships of the blockading force. Capture is, however, no longer permissible when the blockade is raised or the pursuit given up. The latter is not of itself the case, when the ship has reached a neutral port."

German Prize Rules, 1909.

"78. Any vessel that forces a blockade should be captured, whether neutral, allied or national, under reservation, with respect to the latter, of the application of the penal laws in force against those who supply the enemy with intelligence."

"79. Nevertheless no seizure can be made of a ship which, after having forced a blockade, has gained the high seas, if the pursuit has been abandoned."

French Naval Regulations, 1912.

Article 20 of the Declaration of London, 1909, substantially appears as Art. 101 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"The liability of a blockade runner to capture and condemnation begins and terminates with her voyage. If there is good evidence that she sailed with intent to evade the blockade, she is good prize from the moment she appears upon the high seas. Similarly, if she has succeeded in escaping from a blockaded port she is liable to capture at any time before she reaches her home port. But with the termination of the voyage the offense ends."

Instruction to United States Blockading Vessels, * * * General Orders, No. 492, June 20, 1898.

"The liability of a vessel to capture and condemnation for breach of blockade ceases at the end of her return voyage. The *Wren*, 6 Wall. 582."

Moore's Digest, vol. 7, p. 839.

"A cargo taken from a port in violation of a blockade, with the intent to transship it at an intermediate port for its port of ultimate destination, remains liable to capture and condemnation after the transshipment. The *Thompson*, 3 Wall. 155."

Moore's Digest, vol. 7, p. 839.

Contra.

"The offense of breach of blockade 'can not travel onwards with the vessel beyond the termination of the return voyage. If captured, or recaptured, at any stage of that voyage, she is taken *in delicto* and liable to be condemned; but if, as in the present case, she terminates it in safety, that liability is viewed as having ended.'

"Mr. Vail, Act. Sec. of State, to M. Pontois, French min., Oct. 19, 1838, MS. Notes to French Leg. VI. 32."

Moore's Digest, vol. 7, p. 839.

In the case of the *Weelvaart Van Pillaw* (1799) (2 C. Rob. 128), a merchantman coming out of the blockaded port of Amsterdam "had escaped the interior circumvallation" of the blockading squadron and was not captured until after "she had advanced some way on her voyage." On this fact it was contended that she should not be condemned. Sir William Scott said: "I cannot accede to that argument; if the principle is sound, that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force, you are free; this would be a most absurd application of the principle. * * * If a ship, that has broken a blockade, is taken in any part of that voyage, she is taken *in delicto*, and subject to confiscation."

In the *Juffrow Maria Schroeder* (1800) (3 C. Rob. 147), the court said: "It has been held by the court [see the *Neptune*, 2 C. Rob. 110, and the *Weelvaart Van Pillaw*, 2 C. Rob. 128] that where a ship has contracted the guilt by sailing with an intention of entering a block-

aded port, or by sailing out, the offense is not purged away till the end of the voyage; till that period is completed, it is competent to any cruiser to seize and proceed against her for that offence."

In the *Galen*, (1901) (37 Ct. Cls., 89), the court said: A vessel engaged in blockade running "is engaged *ab initio* in illegal traffic. From the hour she sails to the hour she returns to her home port she is taking a part in the existing war—she is assisting or endeavoring to assist one of the belligerents and to thwart the military plans and purposes of the other. It is not necessary that she be taken in the act of breaking the blockade to be *in delicto*—she is *in delicto* from the first to last. * * * She is liable to capture and condemnation not only on the outward voyage but on the return voyage, notwithstanding that her homeward-bound cargo may be and ordinarily is, innocent merchandise."

In the case of the *King Arthur* (1905) it was contended, that the vessel should not be condemned for the reason that, although she was captured while Port Arthur was under blockade the proceedings in Prize Court were not held until after the raising of the blockade.

With respect to this contention the Higher Prize Court of Japan, (2 Russ-Jap. P. C. 217), said: "The liability to condemnation of a vessel which has committed a breach of blockade, whether the blockade is still in force or not at the time of trial, so long as she is captured after the blockade is established, and while the blockade is still in existence, is recognized by International Law."

VESSEL GUILTY OF BLOCKADE RUNNING LIABLE TO CONDEMNATION—PRESUMPTION OF GUILT AGAINST CARGO.

A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.—*Article 21, Declaration of London, 1909.*

"The vessel is condemned in all cases. The cargo is also condemned on principle, but the interested party is allowed to oppose a plea of good faith: that is to say, to prove that when the goods were shipped the shipper did not know and could not have known of the intention to break the blockade."

General report of drafting committee to London Naval Conference.

"2. * * * Merchant vessels * * * which have run a blockade which was declared and was effective, are also subject to capture."

Institute, (1887), p. 15.

"Article 39. Merchant vessels are forbidden to enter or leave the places and ports which are in a state of effective blockade."

Institute (1882), p. 53.

"Article 112. The prize courts cannot condemn enemy or neutral prizes except on the following grounds: * * *

"2. Violation of blockade * * *"

Institute (1887), p. 76.

"Article 114. In order that a vessel may be condemned on the ground that it has violated a blockade, it is necessary:

1. That the blockade be published and effective;

2. That it has been brought to the attention of the accused vessel, and that this vessel has attempted to violate the blockade according to the provisions of the present regulations (Articles 43 and 44).

There is no ground for condemnation if a vessel has passed through the line of blockade, or into a blockaded sea, by accident, such as a tempest, or in error; but these facts must be proved by the vessel setting them up."

Institute (1887), p. 76.

"Article 118. The vessel shall be condemned with its cargo:

1. In case of violation of blockade (Article 114): * * *"

Institute (1887), p. 77.

"The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always *prima facie*, implicated in the guilt of the owner or master of the ship; and it lays with them to remove

the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owner. The old doctrine was much more severe, and often inflicted, not merely a forfeiture of the property taken, but imprisonment, and other personal punishment; but the modern and milder usage has confined the penalty to the confiscation of the ship and goods. * * * The penalty for a breach of blockade is * * * held to be remitted, if the blockade has been raised before the capture. The *delictum* is completely done away when the blockade ceases."

Kent, vol. 1, pp. 156, 157.

"The *presumption* of law, founded on very probable reasoning, is, that the violation of a blockade is intended for the benefit of the cargo, as well as of the ship, and, consequently, that it is made with the sanction and under the instructions of its owners; and, in all cases, where the innocence of the owners is not manifested by the papers on board, this presumption prevails to exclude the proof. Thus, the rule applies, even where the apparent destination of the ship, judging from her papers, was to a different port, and the attempt to enter that under blockade was a deviation from the regular course of the voyage. Where the only assignable motive for such a deviation is an intention to dispose of the cargo in the blockaded port, and, by such a disposition, to promote the interests of its owners, they are not allowed to contradict the presumption that the master, thus visibly acting for their benefit, was not also acting under their secret authority. * * *

"But if it be clearly established, by proofs found on board at the time of the capture, that, at the inception of the voyage, the owners of the cargo stood clear, even from a possible intention of fraud, their property will be excepted from the penal consequences of the breach of the blockade. Thus, where the illegality consists in the misconduct of the master in attempting to enter a blockaded port, if it be certain that, when the voyage commenced, the existence of the blockade neither was, nor could have been, known at her port of departure, the owners of the cargo could not possibly have contemplated a breach of the blockade. In such cases, the act of the master, although it prevail to condemn the ship, will not condemn the cargo also, for there is no general or necessary relation of principal and agent between its owners and the master. So, also, in case of egress, the ship may be subject to condemnation, and yet the cargo may be restored, although laden during the blockade, if the innocence of its owners be certain and indisputable. Thus, if their orders for the shipment of the goods were given to their agents in the blockaded port before the blockade existed, or was known to exist, and they could not, by any diligence, after the blockade was known to them, countermand their orders in time to prevent their execution, the owners are deemed innocent. In such cases, the agents and owners do not stand in the same relative situation of ordinary agents and principals, for the interests of the former are not only distinct from, but actually opposed to, those of the latter. It must be remarked, however, that, in all cases, whether of ingress or egress, in which an exception is allowed in favor of the cargo, the evidence of the innocence of its owners must be so clear and certain as to exclude any possible imposition on the mind of the court.

Another exception, in this relation, deserves notice. A neutral, domiciled in an enemy's country, *in itinere*, on his return home to reside, was a passenger, with his family, in a neutral vessel, which was guilty of a breach of blockade. The specie which he had with him, for the support and comfort of himself and family, was taken as prize. But the supreme court decreed restitution, on the ground that he had a right to carry with him such property, which was not a mercantile adventure, and that, being personally in no fault, such property was not forfeited by a breach of blockade by the vessel in which he had taken passage."

Halleck, pp. 563, 564.

"Besides the knowledge of the party, some act of violation is essential to a breach of blockade; as either going in or coming out of the port with a cargo laden after the commencement of the blockade.

"Thus, by the edict of the States-General of Holland, of 1630, relative to the blockade of the ports of Flanders, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, or so near thereto as to show beyond a doubt that they were endeavoring to run into them; or which, from the documents on board, should appear bound to the said ports, although they should be found at a distance from them, should be confiscated, unless they should, voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision which affects vessels *found so near to the blockaded ports as to show beyond a doubt that they were endeavoring to run into them*, upon the ground of legal presumption, with the exception of extreme and well-proved necessity only. Still more reasonable is the infliction of the penalty of confiscation, where the intention is expressly avowed by the papers found on board. * * *

"With respect to violating a blockade by coming out with a cargo, the time of shipment is very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose, in any way, to assist the exportation of the property of the enemy. A neutral ship departing can only take away a cargo *bona fide* purchased and delivered before the commencement of the blockade; if she afterwards takes on board a cargo, it is a violation of the blockade. But where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade. So where goods were sent into the blockaded port before the commencement of the blockade, but reshipped by order of the neutral proprietor, as found unsalable during the blockade, they were held entitled to restitution. For the same rule which permits neutrals to withdraw their vessels from a blockaded port extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bona fide* by the neutral proprietor.

"After the commencement of a blockade, a neutral is no longer at liberty to make any purchase in that port. Thus, where a ship which

had been purchased by a neutral of the enemy in a blockaded port, and sailed on a voyage to the neutral country, had been driven by stress of weather into a belligerent port, where she was seized, she was held liable to condemnation under the general rule. That the vessel had been purchased out of the proceeds of the cargo of another vessel, was considered as an unavailing circumstance on a question of blockade. If the ship has been purchased in a blockaded port, *that* alone is the illegal act, and it is perfectly immaterial out of what funds the purchase was effected. Another distinction taken in argument was, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. But this was also overruled, because the port into which she had been driven was not represented as forming any part of her original destination. It was therefore impossible to consider this accident as any discontinuance of the voyage, or as a defeasance of the penalty which had been incurred.

"A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation or land carriage of the country. A blockade may be of different descriptions. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port.

"The legal blockade can extend no further than the actual blockade can be applied. If the place be not invested on the land side, its interior communications with other ports cannot be cut off. If the blockade be rendered imperfect by this rule of construction, it must be ascribed to its physical inadequacy, by which the extent of its legal pretensions is unavoidably limited. But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. This case is very different from the preceding, because there the communication had been by inland navigation, which was in no manner and in no part of it subject to the blockade."

Wheaton, pp. 681, 684, 685.

"'A vessel violates the law of blockade by some positive act of entering or quitting, or by showing a clear and speedy intention to enter a blockaded port. [There are these three essentials, therefore, to a valid capture for breach of blockade. (1) The blockade must be effective. (2) Notification of it must have been given. (3) An intention to break it must appear. Both English and United States courts hold that in case this intention is apparent at the outset of the voyage, the ship is liable. * * *] The penalty is confiscation, and it falls first on the ship as the immediate agent in the crime. The cargo shares the guilt, unless the owners can remove it by direct evidence. The presumption is that they knew the destination of the vessel, for the voyage was undertaken on account of the freight. If ship and cargo are owned by the same persons, the cargo is confiscated of course. * * *

"Besides this penalty on cargo and vessel, the older text writers teach that punishment may be visited upon the direct authors of a breach of blockade. Even De Martens (Sec. 320) declares that corporal pains, by the positive law of nations and by natural justice,

may be meted out to those who are guilty of such breach. But the custom of nations, if it ever allowed of such severities, has long ceased to sanction them."

Woolsey, pp. 350, 351.

"As a general rule the penalty for a breach of blockade is the confiscation of both ship and cargo; but if their owners are different, the vessel may be condemned irrespectively of the latter, which is not confiscated when the person to whom it belongs is ignorant at the time of shipment that the port of destination is blockaded, or if the master of the vessel deviates to a blockaded harbour. If however such deviation takes place to a port the blockade of which was known before the ship sailed, the act is supposed to be in the service of the cargo, and the complicity of its owner is assumed."

Hall, pp. 736–737.

"It is impossible to add much to" the "terse and comprehensive statement" of article 21 of the Declaration of London. "It may, however, be advisable to bring out that the penalty falls first and foremost on the ship, and only incidentally on the cargo. If the ship and cargo are owned by the same person or group of persons, both are condemned. If the ship and cargo are owned by different persons or groups of persons, again both are condemned, unless the owner or owners of the cargo can show that they did not possess, and could not fairly be expected to possess, any knowledge that the port of destination was under blockade. Their knowledge is always presumed, and the burden of proof of ignorance falls on them. If the master of the vessel starts for an open port and deviates to a blockaded port, he is held to do so in the interest of the ship, since he is the agent of its owner. But he is not the agent of the owner of the cargo. If, therefore, the two are different persons or different groups of persons, and the latter can show that at the time of the commencement of the voyage he was ignorant of the existence of the blockade, his goods will probably be released. This was admitted in 1804, and the courts of the twentieth century are not likely to be more severe than their predecessors of the great Napoleonic struggle."

Lawrence, p. 696.

"Capture being effected, the blockade-runner must be sent to a port to be brought before a Prize Court. For this purpose the crew may be temporarily detained, as they will have to serve as witnesses. In former times the crew could be imprisoned, and it is said that even capital punishment could have been pronounced against them. But since the eighteenth century this practice of imprisoning the crew has been abandoned, and nowadays the crew may not even be made prisoners of war, but must be released as soon as the Prize Court has pronounced its verdict. The only penalty which may be pronounced is confiscation of the vessel and the cargo. But the practice of the several States has hitherto differed much concerning the penalty for breach of blockade. According to British and American practice, confiscation of both vessel and cargo used to take place in case the owners of the vessel were identical with those of the cargo. In case vessel and cargo had not the same owners, confiscation of both took

place only when the cargo consisted of contraband of war or the owners knew of the blockade at the time the cargo was shipped for the blockaded port. And it mattered not whether the captured vessel which carried the cargo had herself actually passed through the blockaded line, or the breach of blockade was effected through a combined action of lighters and the vessel, the lighters passing the line and discharging the cargo into the vessel near the line, or *vice versa*. The cargo alone was confiscated according to the judgments of the American Prize Courts during the Civil War in the case of the *Springbok* and in similar cases when goods ultimately destined for a blockaded port were sent to a neutral port on a vessel whose owners were ignorant of this ulterior destination of the goods.

"The Déclaration of London settles the matter by a very simple rule, for according to article 21 the penalty for blockade-breaking is condemnation of the vessel in all cases, and condemnation of the cargo also, unless the owner proves that at the time of the shipment of the goods the shipper *neither knew nor could have known* of the intention of the vessel to break the blockade. The case in which the whole or part of the cargo consists of contraband, is not mentioned by article 21, but its condemnation is a matter of course."

Oppenheim, vol. 2, pp. 476–478.

Crew of Blockade Runner.

"Since blockade-running is not a hostile proceeding, and the belligerent's rights with regard to it are limited to those which the accepted compromise gives him over the ship and cargo, the crew of a captured blockade-runner must not be treated as enemies and prisoners. They are bound not to resist the vessel's being taken to a port of the captors for adjudication, but if they rise and rescue her their state will not be obliged to restore her or visit the crew with any punishment. If, however, she falls again into the power of the captor's state before her offence has been deposited by the completion of her voyage, she will be condemned with her cargo, which suffers for the deeds of the master to which it was entrusted, whatever may be the merits of her case in other respects."

Westlake, vol. 2, pp. 274, 275.

"Since the material part of the offence of blockade-running consists in the ingress or egress, or attempted ingress or egress, of a ship, and the master, by whom the course of the ship is directed, is the agent of her owner, the master's knowledge of the blockade binds the owner, and the ship is confiscable independently of the latter's personal knowledge. Where the ship and cargo belong to the same persons, the knowledge of the master, as their agent, affects them to the extent of all their property concerned in the transaction, and the cargo also is confiscable. Where the ship and cargo belong to different persons, it has been 'established that when the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and they might therefore by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence. * * * The necessity of acting upon these rules is rested by Lord Stowell on the notoriety of the fact that in almost all

cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose which the captors would have no means of disproving.' (The *Panaghia Rhomba*, 12 Moore, P. C. 168.) * * * "The owners of the cargo, if the penalty was really incurred without their privity, must seek their remedy against the master or owners of the ship. It may however happen that the blockade was known to the master but not to the owners of the cargo, whose property will then escape condemnation." * * *

"In the United States during the civil war the carriage of contraband was generally presented to the courts in connection with blockade-running, to which the doctrine of continuous voyage does not apply. The offence of blockade-running, consisting in the attempt to communicate with a prohibited port and not in the introduction of a prohibited class of goods, is essentially one of the ship, and not an offence of the goods except as derived from that of the ship. If a ship is bound for a neutral port, not as a port of call, no blockade-running has been attempted by her, and her cargo, still innocent, cannot connect her with any such attempt which the ship into which it may be removed may afterwards commit. The United States judgments however did not always distinguish sufficiently between the two conditions.

Westlake, vol. 2, pp. 274, 297, 298.

ART. 106. The Commander should detain any Vessel, though Neutral, which is engaged in Breach of Blockade."

Naval Prize Law, Holland.

"ART. 107. For a Breach of Blockade it is requisite[1]:

"(1) That a valid Blockade is in existence (*See* secs. 107–113.)

"(2) That the Vessel visited is affected with Notice of the Blockade. (*See* secs. 114–128.)

"(3) That the Vessel visited has attempted to break the Blockade. (*See* secs. 129–136.)"

Naval Prize Law, Holland.

"ART. 133. A Breach of the Blockade Inwards is committed by any Vessel, whether in ballast or with cargo, which, with Notice of the Blockade, either Actual or Constructive—

"1. Passes or attempts to pass the Blockading Squadron into the Blockaded Port.

"2. Without attempting to pass, approaches the Blockading Squadron, and either anchors[2] or hangs about[3] in such a position that it would be easy for her, without being detected, or before she could be stopped by the Blockading Squadron, to slip into the Blockaded Port or to get under cover of the forts of the hostile territory.

"3. Without herself attempting to pass, discharges her cargo into lighters, to be carried by them across the Blockaded line into the Blockaded Port; but it is no breach for a Vessel to deliver Goods at an adjoining port not itself blockaded, even though the Goods

[1] "*Betsey*, 1 Rob. 92n."
[2] "*Neutralist*, 6 C. Rob. 30."
[3] "*Charlotte Christine*, 6 C. Rob. 101."

are destined for the Blockaded Port, provided that they are to be transported thither overland or by canal navigation, without crossing the Blockaded line.[1]

"4. Is found near to the Blockaded Port, and is observed to be steering for it, whatever may appear by her Papers to be her Port of Destination.[2] But it is to be remembered that the Captor will not, in the first instance, be allowed, for the purpose of procuring the condemnation of the Vessel, to give evidence either as to the place where the Vessel was met with, or the course she was steering; but all evidence must, in the first instance, come from the Vessel's Papers or from her Master and Crew.

"5. In the case of a Blockade by Notification,—has sailed, after the Notification has taken place, with the Blockaded Port for her destination, however distant from it she may be at the time when she is visited;[3] except:

"(a) When sufficient time has not elapsed for the Notification to have been communicated by the Neutral Government to its subjects.[4]

"(b) When the Port from which the Vessel sails is so distant from the scene of the war as to justify her Master in starting with a destination known to be blockaded, on the chance of finding that the blockade has been removed, and, should that not prove to be the case, with an intention of changing her destination.[5]

"(In these two cases the Commander should turn the Vessel back, after inscribing on her papers a Notice of the Blockade).

"(c) When the Master, though he originally sailed with a blockaded destination, has definitely abandoned it; which will not be the case if he has merely altered his course under stress of weather, or to avoid belligerent cruisers.[6]"

Naval Prize Law, Holland.

"ART. 135. The only excuses which justify a Breach of the Blockade are:

"1. Absolute necessity, as where stress of weather and want of provisions compel the Vessel to put into port, and the only accessible ports are those under blockade.[7]

"2. The misinformation of the Master, provided that the person misleading him was an Officer of one of Her Majesty's Cruisers, and that the points on which the Master has been so misled have been matters of fact;[8] as e. g., where the Master has been misinformed by such an Officer that the Blockade has been raised, whereas it is still being maintained, or that the limits of the Territory under blockade are narrower than they really are. But where the misinformation of the Master by the Officer concerns only the legal consequences of a Blockade[9]—for instance, when the Officer has told him that he is

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[1] "*Jonge Pieter*, 4 C. Rob. 79."
[2] "*Gute Erwartung*, 6 C. Rob. 182. *Mentor*, Edwards, 207. *Chrissys*, Spinks, 343."
[3] "*Vrouw Joanna*, 2 C. Rob. 109. *Neptunus*, 2 C. Rob. 111. *Circassian*, 2 Wallace, 135."
[4] "*Jonge Petronella*, 2 C. Rob. 131. *Adelaide*, 3 C. Rob. 281."
[5] "*Betsy*, 1 C. Rob. 332. 'This indulgence was granted early in this century to vessels sailing from America, on the ground that otherwise 'the effect of a blockade would last two months' longer upon them than upon the trading nations of Europe.' It may be doubted whether such an indulgence can be reasonably expected since the introduction of steamships and telegraphic cables."
[6] "*Imina*, 3 C. Rob. 167. *Minerva*, 3 C. Rob. 229. *James Cook*, Edwards, 263."
[7] "*Hurtige Hane*, 2 C. Rob. 124. *Fortuna*, 5 C. Rob. 27. *Charlotta*, Edwards, 252."
[8] "*Neptunus*, 2 C. Rob. 111."
[9] "*Comet*, Edwards, 32. *Courier*, Edwards, 249."

entitled to a Warning before his Vessel can be seized, or that he may go in if he takes no cargo—the Master will not be excused. And the plea of misinformation by any private person, on any point whatever, will be insufficient."

Naval Prize Law, Holland.

"Art. 136. Other excuses are often made, [for breach of blockade], but they may all be disregarded; such are:—

"1. That the Master was approaching the blockaded place only to ascertain whether the Blockade was not raised, and with the intention of retiring in case he found it was continuing.[1]

"2. That the Master's object in approaching the blockaded port was not a commercial one, to bring in or take out a cargo;[2] but was to get a pilot,[3] or provisions,[4] or to fetch away goods deposited there before the breaking out of the war.[5]

"3. Intoxication of the Master.

"4. Ignorance of the Coast.[6]

"5. Loss of Compass.[7]

"6. Desire to avoid the higher fees payable at another port."[8]

Naval Prize Law, Holland.

"Art. 138. The Penalty for Breach of the Blockade is the confiscation of the Vessel and in most cases of the Cargo also."[9]

Naval Prize Law, Holland.

"12. The cargo of merchant vessels of a neutral nationality is liable to be condemned as prize:— * * *

"(2) When the cargo is on board a vessel which is liable to condemnation under clauses 2–4 of Article 11 [for breaking blockade, resisting stoppage, etc., and taking part in enemy operations], and it is not proved that such cargo belongs to Russians, or to neutrals who have taken no part in the infractions entailing condemnation."

Russian Prize Regulations, 1895.

"Art. 45. The crews of neutral vessels violating or attempting to violate a blockade are not to be treated as prisoners of war, but any of the officers or crew whose testimony may be desired before the prize court should be detained as witnesses."

United States Naval Code, 1900.

"Art. 37. Ships coming under the following categories are liable to capture without regard to their nationality:— * * *

"3. A ship which has committed a breach of blockade."

Japanese Regulations, 1904.

"Art. 40. A ship belonging to the enemy shall be condemned.

"Enemy goods forming part of the cargo on board the ship mentioned in the preceding clause shall be condemned. If, however, the

[1] "*Betsy*, 1 C. Rob. 332. *Posten*, 1 C. Rob. 335 n. *Spes* and *Irene*, 5 C. Rob. 76. *Shepherdess*, 5 C. Rob. 262. *Apollo*, 5 C. Rob. 286. *James Cook*, Edwards, 261."

[2] "*Exchange*, Edwards, 39. *Charlotta*, Edwards, 252."

[3] "*Elizabeth*, Edwards, 198. *Arthur*, Edwards, 202."

[4] "*Fortuna*, 5 C. Rob. 27."

[5] "*Comet*, Edwards, 32. *Jeanne Marie*, Spinks, 167."

[6] "*Adonis*, 5 C. Rob. 256."

[7] "*Elizabeth*, Edwards, 198."

[8] "*Hurtige Hane*, 2 C. Rob. 124."

[9] "*Adonis*, 5 C. Rob. 259. *Panaghia Rhomba*, 12 Moore P. C. 168."

ship is equipped for fighting, the whole of her cargo shall be condemned."

Japanese Regulations, 1904.

"ART. 45. A ship committing a breach of blockade, and her cargo, shall be condemned. If, however, it be clearly proved that an owner of cargo was unaware of the circumstances, the cargo in question shall not be condemned."

Japanese Regulations, 1904.

"80. A ship that has made itself liable for violation of blockade is subject, in addition to capture, to condemnation. Her cargo is also confiscable unless it is proved that the shipper at the time of shipping the merchandise neither knew nor could have known of the intention to violate the blockade.

"In case of doubt, the captain will regard the whole cargo as confiscable.

"Concerning the law for seizing the confiscable parts of the cargo apart from the bringing in of the ship see 121."

German Prize Rules, 1909.

"101. If a neutral ship is captured according to * * * 77, 78, for breach of blockade, * * * the entire crew—including the Master and officers—will be released unconditionally."

"102. The release will be accomplished by discharge from on board when the prize is delivered. The necessary witnesses are however to be held. The names of the conditionally released enemy and neutral persons are to be reported direct to the Chief of Admiral Staff, for communication to the hostile power."

German Prize Rules, 1909.

"83. You will capture every vessel known to be guilty of violation of blockade. Such vessel will be liable to confiscation."

French Naval Regulations, 1912.

Article 21 of the Declaration of London, 1909, substantially appears as Art. 102 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Moore quotes the following excerpt from a letter, dated December 31, 1861, from the Secretary of State to the Secretary of the Navy:

"'The Department has been informally apprised that Commander Woodhull, of the United States steamer *Connecticut* recently exacted, as a condition of the release of members of the crew of the British schooner *Adeline*, captured for a breach of the blockade, that they should enter into an engagement not to be employed in a similar proceeding, in future. It occurs to this Department that, as the requirement referred to is not warranted by public law, the commanders of blockading vessels should be instructed not to exact any similar condition for the release of persons found on board of vessels charged with a breach of the blockade. * * *'"

Moore's Digest, vol. 7, p. 838.

"Blockade running is a distinct offence, and subjects the vessel attempting, or sailing with the intent, to commit it, to seizure without

regard to the nature of her cargo. The presence of contraband of war in the cargo becomes a distinct cause of seizure of the vessel, where she is bound to a port of the enemy not blockaded, and to which, contraband of war excepted, she is free to trade."

Instructions to United States Blockading Vessels, Navy Department General Orders, No. 492, June 20, 1898.

"A neutral vessel may sail in good faith for a blockaded port with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. But, in such case, she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure."

Instructions to Blockading Vessels, Navy Department General Order No. eral Orders, No. 420, June 20, 1898. (For. Rel. 1898, 780.)

"The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration. Any of the officers or crew, however, whose testimony before the prize court may be desired, should be detained as witnesses."

Instructions to Blockading Vessels, Navy Department, General Order No. 492, June 20, 1898.

"A British prize sentence, condemning an American vessel, recited that, the vessel having been cleared for Cadiz, a port actually blockaded by the British, the master of the brig 'persisted in his intention of entering that port, after warning from the blockading force not to do so.' The condemnation occurred in August, 1800. By article 18 of the treaty between the United States and Great Britain of 1794 it was provided that if a vessel sailed for a blockaded port without knowledge of the blockade, she might be turned away, but should not be detained, nor the cargo, if not contraband, be confiscated, 'unless after notice she shall again attempt to enter.' It was held that 'persisting in an intention' was not an 'attempt to enter,' and that the decree did not show a valid ground of condemnation. This being so, it was held that the parties might look to other evidence in the case. The facts were recited in a special verdict, by which it appeared that the vessel, instead of being first turned away, was, though she had no previous knowledge of the blockade, simply detained, and that her master was drawn into certain conversations in which he used expressions which might be construed as evidence of an intention to sail for Cadiz, should he be liberated. These facts were held not to amount to an attempt again to enter that port. As to what might constitute such an attempt, the court observed: 'Lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port.' Fitzsimmons *v.* Newport Ins. Co. (1808), 4 Cranch, 185, 200."

Moore's Digest, vol. 7, pp. 830, 831.

"Where, in time of war, a foreign vessel, availing herself of a proclamation of the President of May 12, 1862, entered the port of New Orleans, the blockade of which was not removed, but only relaxed in the interests of commerce, she thereby assented to the conditions imposed by such proclamation that she should not take out goods contraband of war, nor depart until cleared by the collector of customs according to law. United States *v.* Diekelman, 92 U. S. 520."

Moore's Digest, vol. 7, pp. 845.

"A permit to enter or depart from a blockaded port, issued by an officer who has no authority to grant it, is invalid, and will not save a vessel from condemnation on the charge of blockade running. The *Sea Lion*, 5 Wall. 630; s. p., The *Ouachita Cotton*, 6 id. 521; s. p., The *Reform*, 3 id. 617; s. p., Coppell *v.* Hall, 7 id. 542."

Moore's Digest, vol. 7, p. 845.

"A vessel was condemned for intended breach of the blockade of the southern coast, having been found near Great Abaco Island, with no destination sufficiently proved, without sufficient documents, with a cargo of which much the largest part consisted of contraband of war, and with many letters addressed to one of the blockaded ports, for which her chief officer declared that she meant to run. The *Adela*, 6 Wall. 266."

Moore's Digest, vol. 7, p. 835.

"A cargo shipped from a neutral country by neutrals resident there, and destined ostensibly to a neutral port, was restored with costs after capture in a suspicious region, and where the vessel on its outward voyage had violated a blockade; there having been nothing to fix on the neutrals themselves any connection with the ownership or outward voyage of the vessel (which was itself condemned), nor anything to prove that their purposes were not lawful. But a certain portion of the cargo, which had been shipped like the rest, except that the shipper was a merchant residing and doing business in the enemy's country, was condemned. The *Flying Scud*, 6 Wall. 263."

Moore's Digest, vol. 7, p. 834.

"A vessel sailing through blockaded waters was seized on suspicion of intent to break the blockade. Besides the fact that her manifest bore date as of a day when only a part of the cargo was laden, her bills of health and clearance pointed to one port as her port of destination, while the captain's letter of instructions required him to stop at another, not in a direct line, for instructions. The vessel's bills of health specified six men and no passengers, there being, in fact, one passenger; and the provisional certificate of registry represented as sole owner one person, and other papers another. It was held that these circumstances justified the seizure.

"It further appeared that the vessel's name had been changed, and that her master had ten months before commanded a blockade runner. Not only was her ownership in doubt, the ostensible ownership being apparently but a mere cover, but no claim was put in for her, except by the captain, who put in a claim for the ostensible

owners, though without instructions from them and only in his capacity of master. The evidence, too, was very strong that a portion of the cargo was enemy's property. Under these circumstances condemnation was decreed. The *Jenny*, 5 Wall. 183."

Moore's Digest, vol. 7, p. 833.

"Evidence of intent to violate blockade may be collected from bills of lading, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture. The *Circassian*, 2 Wall. 135."

Moore's Digest, vol. 7, p. 832.

"A neutral vessel, completely laden with a neutral cargo and at anchor on the neutral side of a river which washed a blockaded coast, drifted into hostile waters and was captured while temporarily at anchor there on suspicion of intent to break the blockade. It was held that temporary anchorage in waters occupied by the blockading vessels did not justify capture in the absence of other grounds. The *Teresita*, 5 Wall. 180."

Moore's Digest, vol. 7, p. 832.

"If a vessel is found without a proper license near a blockading squadron, under circumstances indicating intent to run the blockade, and in such a position that if not prevented she might pass the blockading force, she cannot thus, flagrante facto, set up as an excuse that she was seeking the squadron with a view of getting an authority to proceed on her desired voyage. The *Josephine*, 3 Wall. 83."

Moore's Digest, vol. 7, p. 831.

"Preparations towards entering a blockaded port, such as hovering around it, with other acts from which an intention to enter may be inferred, are grounds for seizure, unless the blockade is exclusively for ingress or egress. The *Coosa*, 1 Newb. Adm. 393; The *Hiawatha*, Blatchf. Pr. Ca. 1; The *Empress*, Blatchf. Pr. Ca. 175; *Halleck*, Int. Law (1861), ch. 23, sec. 23."

Moore's Digest, vol. 7, p. 831.

"Mere sailing for a blockaded port is not an offense, but where the vessel has knowledge of the blockade, and sails with the intention of violating it, she is liable to capture. A vessel setting sail from England on the 9th of September, 1861, with actual knowledge of a proclamation which the President of the United States made on the 19th of the April preceding, blockading certain Southern ports, had no right, under an allegation of a purpose to see if the blockade existed, to sail to one of the ports actually blockaded. The *Admiral*, 3 Wall. 603."

Moore's Digest, vol. 7, p. 829.

"No neutral can, after knowledge of a blockade, lawfully enter or attempt to enter the blockaded port; and to do so would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation. McCall *v.* Marine Ins. Co., 8 Cranch, 59."

Moore's Digest, vol. 7, p. 831.

"The British steamship *Newfoundland* was seized off the coast of Cuba July 19, 1898, by a United States cruiser on a charge of attempt to violate the blockade of Havana. After the preparatory testimony was taken, an order was made for further proof, and on the subsequent hearing the vessel and cargo were condemned. This sentence the Supreme Court reversed. The case was one chiefly of fact. It was alleged that the vessel was loitering with intent to seize an opportunity to run into Havana; that her usual lights were not displayed, and that she was out of her proper course. These allegations were disputed, and the court was unwilling, upon the mere concurrence of a number of 'suspicious circumstances,' each one of which 'standing alone' could be 'explained,' to hold that guilt was established. The court below, in discussing the proof of loitering, observed that it fell 'very far short' of the inculpatory evidence in the cases of certain sailing vessels, which the Government had cited as precedents for condemnation; but suggested that proof less full and precise might be accepted in the case of steam vessels, owing to their superior power of movement. 'Undoubtedly there is a difference,' said the Supreme Court, 'but if steam has increased the power of blockade runners, it has increased in greater degree, when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective.' It was ordered that the vessel and cargo be restored, but without costs or damages. The *Newfoundland* (1900), 176 U. S. 97 * * * the case * * * in the court below is reported in 89 Fed. Rep. 99, 510."

Moore's Digest, vol. 7, pp. 833, 834.

In The *Mercurius* (1798) (1 C. Rob. 80), it was said in respect to the cargo of a vessel captured for breach of blockade of Amsterdam that: "The cargo is not affected unless the owners of the cargo were (1) either cognizant of the blockade at the time of sailing, or (2) unless the master had been expressly constituted by the owners of the cargo as their agent."

In the case of the *Frederick Molke* (1798) (1 C. Rob. 86), a Danish ship had entered the blockaded port of Havre, taken on board a cargo, and was captured by the blockading squadron while coming out on a voyage to Africa.

It was contended on the part of the ship that the egress "was a new transaction" and that the court had "no right to look back to the delinquency of the former voyage;" reference was also "made on this point to the law of contraband, where the penalty does not attach on the returned voyage."

In regard to this contention Sir William Scott said: "But is there that analogy between the two cases which should make the law of one necessarily or in reason applicable to the other also? I cannot think there is such an affinity between them. There is this essential difference, that in contraband, the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.

"For what is the object of blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place.

I must therefore consider the act of egress to be as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

"There may, indeed, be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it could not be maintained, that they might not be at liberty to retire.

"But even then a question might arise, if it was attempted to carry out a cargo: for that would, as I have before stated, contravene one of the chief purposes of blockade.

"A ship then, in all cases, coming out of a blockaded port, is in the first instance liable to seizure; and to obtain release, the claimant will be required to give a very satisfactory proof of the innocency of his intention. In the present case, the ingress was criminal, and the egress was criminal, and I am decidedly of opinion that both ship and cargo, being the property of the same person, are subject to confiscation."

In the case of the *Betsey* (1 C. Rob. 92), Sir W. Scott lays down the rule that "to constitute a violation of blockade three things must be proved: 1st. The existence of an actual blockade; 2dly, The knowledge of the party supposed to have offended; and, 3dly, Some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade."

Wheaton, p. 672.

In the case of the *Panaghia Rhomba* (Moore P. C. vol. XII. 180) "it was held to be an irresistible inference of law, that the owners of a cargo are liable for the act of the master in attempting to run a blockade, if the cargo was shipped after they knew of the existence of the blockade, or might have known of it, and might by possibility have been privy to the intent of the master. In such case, not only is no proof of their privity necessary, but they are not permitted to deny it."

Wheaton, Dana's Note 238, p. 686.

See also collection of cases in Wheaton, Vol. II, Appendix 36–40 as to how far acts of master bind owner in cases of breach of blockade.

In the *Vrow Judith* (1799) (1 C. Rob. 150), Sir William Scott said that where "the cargo was put on board after the knowledge of the blockade. I should have no hesitation in saying what I have indeed before laid down, that the act of the master of the vessel binds the owner in respect to the conduct of the ship, as much as if it was committed by the owner himself. There are powers with which the law invests him; and if he abuses his trust, it is a matter to be settled between him and the person who constituted him master: but this act of violation is, as to the penal consequences, to be considered as the act of the owners."

In the case of the *Columbia* (1799) (1 C. Rob. 154), it was said by Sir William Scott: "It is unnecessary for me to observe that there is no rule of the law of nations more established than this; that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all books of law, and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge."

This was the case of an American vessel sailing from America with a cargo for Europe. The master was to report to agents at Hamburg for further directions as to port of destination. The Hamburg agents had been instructed to send the ship to a consignee at Amsterdam "'if the wind should continue unsteady, and keep the English cruisers off the Dutch coast;' if not, they were to unload the cargo, and forward it by the interior navigation to Amsterdam." The American owners of the ship and cargo did not know of the blockade of Amsterdam. It was known, however, by the Hamburg agents and also by the master after he reached European waters. The Hamburg agents ordered the ship "to proceed to Amsterdam, if the winds should be such as to keep the English at a distance."

The ship was captured by the English naval force and condemned with her cargo as good prize, the court holding "that the act of the master will affect the owner to the extent of the whole of his property concerned in the transaction. The ship and cargo belong, in this case, to the same individuals, and therefore they must be both involved in the sentence of condemnation."

In the case of the *Adelaide* (1799) (3 C. Rob. 281), which vessel was condemned for breach of blockade of Amsterdam while on her way from that port with a cargo for American merchants (2 C. Rob. 111), the court ordered restitution of the cargo, saying that "in cases of agency of persons in an enemy's country, during a blockade, time must be given to the principal for opportunity of countermanding his orders."

In the case of the *Adonis* (1804) (5 C. Rob. 256), the ship was captured for breach of blockade of Havre. In answering the plea that the cargo should not be condemned for the fault of the master, Sir William Scott said: "It has been argued that the master is not the representative of the owner of the cargo. Certainly he is not, to that extent, and in the same manner, in which he is held to be the representative of the owner of the ship. On that account, in some cases, when facts have shown that the intention of the owner was pure, the court has given the party the benefit of this distinction; for instance, where the voyage began before the knowledge of the blockade and where the master, on being warned has appeared to have been actuated only by a personal obstinacy and perverseness, in pursuing his course to the place of his original destination. That is a case where the intention of the owner is admitted to be pure, where nothing stands against it *in limine*, where there is no question of fact, whether he was consentient to the fraud, and, where, if he was affected at all, it could only be by the strict legal principle that affects the principal by the conduct of his agent."

In Fitzsimmons *v.* Newport Insurance Co. (1808) (4 Cranch, 185), Chief Justice Marshall said: "The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter that port, after warning by the blockading force, is the ground for the sentence. * * *

"Vattel, b. 3, s. 177, says, 'All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form the blockade, I have a right to hinder any one from entering, and to

treat as an enemy whoever *attempts* to enter the place, or carry any thing to the besieged, without my leave.' The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the *attempt* to enter, and certainly this attempt must be made by a person knowing the fact."

In discussing the question of blockade, Mr. Justice Story, in the case of McCall *v.* Marine Ins. Co. (1814) (8 Cranch, 59), said: "The right to blockade an enemy's port with a competent force, is a right secured to every belligerent by the law of nations. No neutral can, after knowledge of such blockade, lawfully enter, or attempt to enter, the blockaded port. It would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation. In such a case, therefore, the arrest and restraint of neutral ships attempting to enter the port, is a lawful arrest and restraint by the blockading squadron."

In U. S. *v. Guillem* (1850) (11 How. 46), the facts were as follows: During the blockade of Vera Cruz by the American fleet in 1847, Guillem, a neutral subject embarked on the *Jeune Nelly*, a neutral vessel, for his home country. The vessel had committed a breach of blockade in entering the port and intended to break the blockade outward. This fault of the vessel was, however, not known to Guillem. On the way out the vessel was captured along with certain money, the personal property of Guillem.

The court held that this money was not good prize and accordingly restored it saying, that if Guillem "did not participate in the design of breaking the blockade, his property is not affected by the misconduct of the vessel in which it was shipped. Even in the case of cargo shipped as a mercantile adventure, and found on board a vessel liable to condemnation for a breach of blockade, although it is prima facie involved in the offence of the vessel, yet, if the owner can show that he did not participate in the offence, his property is not liable to forfeiture. This is the rule as stated by Sir William Scott in the case of *The Alexander*, 4 Rob. 93, and in the case of *The Exchange*, 1 Edwards, 39 * * *."

In the case of Baltazzi *v.* Ryder (1858) (12 Moore P .C. 168), it was held "that where the blockade was known or might have been known to the owners of the cargo at the time the shipment was made, and they might possibly be privy to an intention to violate the blockade, such intention will be assumed as an irresistible inference of law, when the blockade is broken; that in cases of blockade for the purpose of affecting cargo with rights of belligerent, the master shall be treated as agent for owner of cargo as well as for the ship."

The question of the liability of the cargo to condemnation along with the condemnation of the vessel for violation of blockade was considered by the Privy Council in the case of the *Panaghia Rhomba*, (1858) (12 Moore P. C. 168, Scott, 800). The owner of the cargo on board this vessel claimed ignorance of any knowledge on the part of the master to violate the blockade of the port of Odessa.

In its consideration of the case the Privy Council said: "The first case to which we have been referred is the *Mercurius* (1 Rob. 80), which came before Lord Stowell in 1798. There a cargo had been put on board the *Mercurius* in America, at a time when it could not have been known in that country that a blockade of the Texel had

been established. The master, after warning, attempted to enter the Texel, and the ship was condemned, because the owner was bound by the act of the master; but the cargo was restored, because, as Lord Stowell observes, the shippers at the time of shipment could not have known of the blockade, and the master, though he was the agent of the owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo, unless expressly so constituted by them. Lord Stowell, in that case, addressed himself to the argument of the captors, that to exempt the cargo from condemnation would open a door to fraud, if neutrals were allowed to trade with blockaded ports with immunity, by throwing the blame upon the carrier-master; and, in answer to that objection, he observed, that 'if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation, and it would be at the same time sufficient to cause the master to be considered in the character of agent, as well for the cargo as for the ship.'

"In that case Lord Stowell seems to have thought that the owners of the cargo were not bound by the act of the master without their authority, and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, 'Violation of blockade by the master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner is cognizant of the intended violation.'

"Now, in the present case, Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of the *Mercurius*, their lordships would have great difficulty in assenting to the decision now under review.

"But subsequent cases seem to have carried the rule much further, and to have established that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment, and the additional authorities mentioned at the bar.

"In the case of the *Alexander* (4 Rob. 94), which occurred in 1801, Lord Stowell held that, in cases of breach of blockade, the court must infer 'that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner.'

"In the case of the *Adonis* (5 Rob. 259), which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could be not let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses, therefore, all the authority which the decisions of the tribunal of a single country can give in a law in which all civilized countries are concerned.

"The same doctrine is laid down by the same great judge in the case of the *Exchange* (1 Edward's Rep. 42), in 1808, and in the *James Cook* (1 Edwards, 261), in 1810.

"We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which, nevertheless, may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the claimants, are British subjects.

"The propriety, or rather the necessity, of acting upon these rules, is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade, the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if, in reality, the penalty was incurred without any privity on their part.

"It is impossible not to feel the force of this reasoning; it rests on the same grounds with another rule of the Prize Courts, which treats as invalid the sale of a ship *in transitu*, a point upon which we have had very recently to examine the law.

"Against a rule, acted upon and promulgated to the world for so many years, the counsel for the appellants, though challenged to do so by the respondents, have not produced a single decision or dictum by any one judge or jurist in any part of the world. Under these circumstances, their lordships must consider it as a settled principle of prize law by which they are bound.

"Holding themselves to be precluded by the rule of law from looking into the evidence in the case in order to judge of the guilt or innocence of the claimants, they can express no opinion upon this subject. But they think that, as the learned judge in the court below has declared his conviction of their entire innocence, and his reluctance to pronounce the sentence complained of, the claimants may fairly be considered to have been invited to bring this appeal, and that in affirming the sentence, her Majesty should be advised to make the order without awarding costs against the appellants."

In the *Hiawatha* (1861) (Blatch. 1. 20), the court said: "The acts of the master of the vessel in breach of the blockade will affect the cargo equally with the vessel, if the cargo is laden on board after the blockade has become effective as to the vessel. Sir William Scott in the *Vrouw Judith*, (1 Ch. Rob., 151,) the *Frederick Molke*, (Id., 88,) and the *Betsey*, (Id., 94,) declared the rule to be, that a neutral cannot export cargo from a blockaded port, taken on board after knowledge of the blockade. The breach of blockade by the ship will equally affect the cargo on board, unless there be clear proof of the innocency of the cargo, and that it was neutral property at the time the blockade was established. The evidence of that fact is not satisfactory in this case, as to any portion of the cargo, and a strong suspicion rests upon some part of it, that it is enemy property. The whole cargo (cotton and tobacco) being the product of the enemy's country, the

evidence should have been made free of doubt by the claimant, that it was shipped before notice of the blockade, or further proof should have been prayed for and introduced to that point. The want of such proof would seem to have prevented the discharge of the vessel by the government, at the instance of the British minister, after her arrest. But, further, in my opinion, the manner of the employment of the ship on this voyage renders the master the agent of the cargo also, on the shipment on the home voyage."

In the *Crenshaw* (1861) (Blatch. 1, 25), the court said: "All of the cargo, not being enemy's property, which was not shipped with intent to evade the blockade then established at the port of Richmond, or was not placed under the charge of the master in such manner as to render him in law the agent of its owner, in attempting to evade the blockade, is entitled to be freed from the arrest and restored to the honest owners, neutrals or residents within loyal States of the Union."

In the *Hallie Jackson* (1861) (Blatch. 41), the court said: "The neutral merchant becomes a participator with the enemy in any undertaking or device to violate a blockade, and his property is thereby made to share a common fate with the enemy's itself."

In the case of the *Evening Star* (1863) (Blatch. 582), which vessel was captured for alleged breach of blockade of Savannah, the cargo, owned by neutrals, was released for the reason that "the testimony of the two owners is positive and direct, on the preparatory examination and the subsequent one given under the allowance of further proof, that their actual and sole purpose in coming out of Savannah was to escape, with their property, from the confederate authority, and deliver the vessel and cargo and themselves to the protection of the blockading squadron, and to the authority of the United States, as loyal citizens thereof. The collateral evidence of the intention of the claimants, manifested by declarations of theirs to friends before the despatch of the vessel and by efforts and preparations set on foot by them, indicates a fixed purpose and anxiety on their part to separate themselves personally and their effects from all connexion with the insurrectionists, and to become wholly detached in interest and residence permanently from them."

See to the same effect the *General C. C. Pinckney* (1863) (Blatch. 668).

In the case of the *Isabella Thompson* (1863) (Blatch. 377), a neutral owned vessel, with a neutral owned cargo was captured en route from Nassau, a neutral port, to another neutral port. The evidence showed that the cargo had been brought to Nassau in a vessel that had violated the blockade of Charleston and there transhipped. The court in releasing vessel and cargo said:—"The neutral consignee at that port [Nassau] acquired a perfect title to the cargo as against the captors, although it was carried to Nassau by runners of a blockade, and the libellants have no legal authority to arrest it on board of a neutral ship while transporting it from a neutral port."

In the *Aries* (1863) (2 Spr. 198, 1 Fed. Cases No. 528), the court said: "The rule of prize courts seems to be that, in all cases of breach of blockade, the owners of the vessel are concluded by the act of the master. In this case, there is satisfactory evidence that the owners knew of the blockade, and must have known and assented to this series of acts in violation of it."

In the *Baigorry* (1864) (2 Wall. 474), it was held that: "Intent to run a blockade may be inferred in part from delay of the vessel to sail after being completely laden, and from changing the ship's course in order to escape a ship of war cruising for blockade runners. A vessel and cargo, though owned by neutrals, may be condemned as enemy property because of the vessel being engaged in enemy trade and because of an attempt to violate a blockade and to elude visitation and search." (Syllabus.)

In the *Helen* (1865) (L. R. 1 Ad. and Ecc. 1, Scott, 821), a master sued the owners of the vessel for breach of contract. The fourth and last article of the owner's answer was objected to.

Dr. Lushington in rendering judgment said that the part of the answer objected to, "alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America: that such an agreement is contrary to law, and cannot be enforced by this Court. In the course of the argument, the judgment in *Ex parte Chavasse re Grazebrook*, 34 L. J. (Bkr.), 17, was cited as governing the case: a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade. * * *

[5] "It is, I conceive, admitted on all hands, that the Court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo*, this contract was illegal by municipal law.

"Now a good deal may depend on the sense in which the word 'illegal' is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out, they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is one of a limited character. For instance suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio*, wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the

acts of the other belligerent? The answer of the blockading power is: 'Mine is a just and necessary war,' a matter which, in ordinary cases, the neutral cannot question, 'I must seize contraband, I must enforce blockade, to carry on the war.' In this state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

"What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: 'You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before.' This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. The fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction. * * *

"I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations. I must direct the 4th article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis*, who seeks to benefit himself by it. As he has failed on every ground, he must pay the cost of his experiment."

In the *Springbok* (1866) (5 Wall. 1), the court said: "We have already held in the case of the *Bermuda* (3 Wall. 514), when goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to the confiscation of the goods, is not liable to condemnation as prize.

"We think that the *Springbok* fairly comes within this rule. Her papers were regular and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definition of neutrality furnished by the international law.

The papers, too, were all genuine, and there was no concealment of any of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo; and there is no sufficient proof that they had any knowledge of its alleged unlawful destination"—a blockaded coast.

A question arose in February, 1863, during the Civil War, "which is of wide-world interest as regards neutral commerce in time of war, and as a consequence of which, if the judgment of the Supreme Court of the United States is to be treated with the respect heretofore paid to that high tribunal and its decree in this case is to be generally accepted as a precedent, it may be reasonably feared that the commerce of neutrals will be subjugated for the future to belligerent exigencies to an extent never before submitted to;—an extent, to borrow the words of an eminent American jurist, formerly United States Secretary of State, 'not tolerable either to their interests or to their pride.'

"It appears that a British vessel, named the *Springbok*, which had sailed from London on 8th December, 1862, bound for Nassau, was crossing the Atlantic, and was on 3rd February, 1863, at the distance of about 150 miles to the eastward of Nassua, the capital of New Providence, one of the group of the Bahama Islands, when she was seized by the United States cruiser, *Sonoma*, and sent in as prize to the Port of New York. She was there libelled in the District Court, and both vessel and cargo were condemned by a decree of that Court as lawful prize. The judgment of the Court was delivered by the Honorable Samuel R. Betts, Judge of the District Court of the Southern District of New York, and the tenor of the Decree was as follows:—

"'United States District Court.

"'The United States *v.* the Barque *Springbok* and Cargo.

"'This suit having been heard by the Court upon the pleadings, proofs and allegations of the parties, and evidence legally invoked therein from other cases, and the premises being fully considered, and it being found by the Court therefrom that the said vessel at the time of her capture at sea was knowingly laden in whole or in part with articles contraband of war with intent to deliver such articles to the aid and use of the enemy; that the true destination of the said ship and cargo was not to Nassau, a neutral port, and for trade and commerce, but to some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade; and, further, that the papers of the said vessel were simulated and false. Wherefore the condemnation and forfeiture of the vessel and cargo is declared. Ordered that a decree be entered accordingly.'

"There could be no uncertainty as to the law applicable to such a case, if it be assumed that the facts warranted the conclusions of the learned judge, namely, that the vessel was bound to a blockaded port, and that the ship-papers were simulated and false. The owners, however, of the ship and cargo appealed from the judgment of the District Court of New York to the Supreme Court of the United States. That High Court, consisting of nine judges, took a totally different view of the facts of the case, and decreed the vessel to be

released, being satisfied that the ship was bound to Nassau, where her voyage was to end, and that her ship-papers were genuine and regular.

"The language of the Supreme Court as reported in 5 Wallace's cases before the Supreme Court, p. 21, was as follows:

"'Her papers were regular, and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definitions of neutrality furnished by international law. The papers were all genuine, and there was no concealment of any of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo, and there is no sufficient proof that they had any knowledge of its alleged unlawful destination.'

"'The preparatory examinations do not contradict, but rather sustain the papers.'

"Bearing in mind the instructions which the President of the United States had directed to be sent to the commanders of the United States cruisers, that before seizing any vessel they were to examine carefully her papers, and if it should appear from them 'that she was actually passing from one friendly or so-called neutral port to another, and not bound to or from a port in the possession of the insurgents, the vessel could not be lawfully seized;' it would seem *primâ facie* that the commander of the *Sonoma* either failed in his duty to examine the papers of the *Springbok* before he made prize of her, or that he seized her in despite of the President's instructions.

"It would have been reasonable for the owners of the cargo to expect a reversal of the decree of the District Prize Court in regard to the cargo, as a consequence of the finding of the Supreme Court of the fact that the ship was passing from one neutral port to another, where she was to discharge her cargo, for the District Court had condemned the cargo as in whole or in part contraband of war by reason of the ship's destination being an enemy's port. It has been already observed that, according to the practice of European Prize Courts, an actual destination of the ship and cargo to an enemy's port or to an enemy's army or fleet, is necessary to warrant a belligerent in capturing a neutral cargo on the high seas and confiscating it as contraband of war, namely, as forbidden to be carried to the enemy. The Supreme Court passed over the question of 'contraband or not contraband' as of secondary importance in the view which the Court took of the law applicable to the case of the cargo, and proceeded to declare it good prize of war upon grounds, which in matter of law find no support in any reported judgment of European or American Prize Courts in any previous war, and which, in matter of fact, were founded on a surmise."

Twiss, Belligerent Right on High Seas, pp. 19–22.

In the *Peterhoff* (1866) (5 Wall. 28), the court said: "So far as liability for infringement of blockade is concerned, ship and cargo must share the same fate. The owners of the former were owners also of part of the latter; the adventure was common; the destination of the cargo, ulterior as well as direct, was known to the owners of the ship, and the voyage was undertaken to promote the objects of the shippers. There is nothing in this case as in that of the *Springbok* to distinguish between the liability of the ship and that of the merchandise it conveyed."

In the case of the *Olinde Rodrigues* (1898) (174 U. S. 510, Scott, 835), it was contended on the part of the captors that the intention of the vessel "to run the blockade is necessarily to be inferred from the possession of * * * bills of health," showing the destination of the vessel to be a blockaded port, "and their alleged concealment and destruction. Doubtless the spoliation of papers, and, though to a less degree, their concealment, is theoretically a serious offence, and authorizes the presumption of an intention to suppress incriminating evidence, though this is not an irrebuttable presumption.

"In the *Pizarro* (2 Wheat. 227, 241), the rule is thus stated by Mr. Justice Story: 'Concealment, or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of farther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.'

"The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned. And on a careful review of the entire evidence, we think we are not compelled to proceed to that extremity.

"But, on the other hand, we are bound to say that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed: and the case disclosed does not commend this vessel to the favorable consideration of the court."

* * * * * * *

The grounds justifying the capture of the *Olinde Rodrigues*, although they were not sufficient to justify her condemnation, are thus set forth by the court:—"This vessel had gone into San Juan on July 4, although the captain had heard of the blockade at St. Thomas, but he says he had not been officially notified of it; he telegraphed to the consul at San Juan to know, and was answered that they had received no official notice from Washington that the port was blockaded; he also heard while in San Juan that 'it would be blockaded some future time, but that was not officially.' The vessel was boarded and warned by the *Yosemite* on July 5, and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, yet she so shaped her course as inevitably to invite it.

"When the *New Orleans* succeeded the *Yosemite*, her commander was informed of the facts by his predecessor, and knew that whatever the right of the *Olinde Rodigues* to be in those waters, she could not lawfully place herself so near the interdicted port as to be able to break the blockade with impunity. But when he sighted her the ship was on a course to all appearances directly into that port,

and steadily pursuing it. And when he signalled, the *Olinde Rodigues* apparently did not obey, but seemingly persisted on her course, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact, when the shot was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal. The turning point into the Culebra or Virgin Passage was perhaps forty miles to the eastward, and while she could have passed the port of San Juan on the course she was on, it would have been within a very short distance. The disregard of her duty to shun the port and not approach it was so flagrant that the intention to break the blockade was to be presumed, though we do not hold that that was a presumption *de jure*.

"The ship's log was not produced until three hours after she was boarded, and it now appears that the papers furnished the boarding officer, 'said to be all the ship's papers,' did not include two Spanish bills of health in which San Juan was entered as the vessel's destination. These were destroyed after the ship reached Charleston, and were, therefore, in the ship's possession when the other papers were delivered. Had they been shown, as they should have been, can it be denied that they would have furnished strong corroboration of criminal intent? Or that their destruction tended to make a case of 'strong and vehement suspicion'?"

The court accordingly restored the vessel to her owners, "without damages," and imposed on her "payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel."

In the case of the cargo of the *Veteran* (1905) (2 Russ-Jap. P. C., 199), the Higher Prize Court of Japan held, in respect to the cargo of a vessel captured for breach of blockade, as follows:

"Moreover, the cargo in this case consisted of things for which there was at the time an urgent demand in Port Arthur, and, as it belonged in its entirety to the charterers, it may be presumed that they and the master, while fully aware of the existence of the blockade, had planned to break it. The decision of the Prize Court condemning the whole of the cargo was therefore correct."

CONDITIONS UNDER WHICH ANCHORED AND UNANCHORED AUTOMATIC CONTACT MINES MAY BE LAID, AND TORPEDOES MAY BE USED.

It is forbidden—

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;
2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;
3. To use torpedoes which do not become harmless when they have missed their mark.—*Article 1, Hague VIII,*[1] *1907.*

"ARTICLE 1. It is forbidden to place anchored or unanchored automatic contact mines in the open sea, the question of mines under electric control being reserved."

Institute (1910), p. 167.

"ARTICLE 2. Belligerents may lay mines in their own and in the enemy's territorial waters.

"But it is forbidden even in these territorial waters: (1) to lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them; (2) to lay anchored contact mines which do not become harmless as soon as they have broken loose from their moorings."

Institute (1910), p. 167.

"ARTICLE 3. It is forbidden to make use, either in territorial waters or on the high sea, of torpedoes which do not become harmless when they have missed their mark."

Institute (1910), p. 167.

"ARTICLE 7. The question of the laying of mines in straits is reserved, both as concerns neutrals and belligerents."

Institute (1911), p. 168.

"ARTICLE 9. A violation of one of the preceding rules entails responsibility therefor on the part of the State at fault.

"The State which has laid the mine is presumed to be at fault unless the contrary is proved.

"An action may be brought against the guilty State, even by individuals, before the competent International Tribunal."

Institute (1911), p. 168.

[1] The present Convention shall remain in force for seven years, dating from the sixtieth day after the date of the first deposit of ratifications.

Unless denounced, it shall continue in force after the expiration of this period.—*Article 11, Hague VIII, 1907.*

"ARTICLE 19. *Torpedoes.*—It is forbidden to employ torpedoes which do not become harmless when they have missed their mark."

Institute (1913), p. 178.

"ARTICLE 20. *Submarine mines.* It is forbidden to lay automatic contact mines, anchored or not, in the open sea."

Institute (1913), p. 178.

"ARTICLE 21. Belligerents may lay mines in their territorial waters and in those of the enemy.

"But it is forbidden, even in territorial waters:

"1. to lay unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

"2. to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings."

Institute (1913), p. 178.

"Submarine mines are of two distinct sorts. The first are called observation mines. They are fired by an operator on shore, who touches a button and frees an electric current when he sees an enemy's war-ship in the act of crossing the mine field. They require no special regulation, as they are easily kept under control and when properly managed cannot harm neutral shipping. But maritime states are giving them up, as being at once expensive and incapable of being worked at a considerable distance from land. The other kind are in no way connected with the shore. They are described as mechanical mines, or automatic submarine contact mines. Their peculiarity is that when struck with considerable force they explode through some internal action. They may be anchored to the bottom and adjusted to any required depth below the surface, or they may be dropped into the water without fastenings of any kind and allowed to drift wheresoever the winds and waves take them."

Lawrence, p. 533.

"Mines have been used on land since the invention of explosives. We have more or less obscure notices of something resembling them at sea in mediæval times, such as the Greek fire and 'serpents' on board the Saracen dromond destroyed by Richard I off Beyrout. But submarine mines properly so called were not adopted as a regular means of defence till the American Civil War, when the Southerners destroyed some of the blockading Northern ships by means of them. Attention was thus directed to them as terribly efficient instruments of warfare; and of late years much inventive ingenuity and scientific knowledge have been applied to the task of developing their destructive qualities. In the Russo-Japanese War of 1904–1905 both belligerents used submarine mines on a large scale, and the results showed that innocent neutrals might suffer from them to a hitherto unsuspected extent. It was, therefore, highly desirable that the Hague Conference of 1907 should regulate the use of the new weapon. It toiled long at the attempt; but the result is one of the least satisfactory pieces of its work. In the preamble of the Convention which

dealt with the subject it declared itself 'inspired by the principle of the freedom of the seas as the common highway of all nations,' and set forth as its aims the mitigation of the severity of war and the protection of peaceful commerce. But it seemed conscious of a failure to attain these exalted objects; for it spoke of the rules it laid down as provisional, and decreed that the contracting powers should reopen the question in six years and a half, unless by that time it had been already settled by a third Hague Conference. * * *

"The Convention was passed at last by a Conference utterly weary of ineffective attempts to deal with the subject; and it bears marks at every turn of the series of compromises that gradually whittled away the strength of the original proposals. The human race must make up its mind whether it is made for war with peace as an occasional breathing-space,or for peace with war as an unfortunate interruption tolerated only because it settles important questions that cannot otherwise be disposed of. If war is paramount, the Convention may stand with all its obvious sacrifices of neutral safety to belligerent exigencies. If not, drastic alterations are required in it, as its authors more than suspected."

Lawrence, pp. 532–536.

"The Conference established no restrictions [other than that found in Article 2] as to the places where mines may be laid; but the common law of nations does in effect forbid belligerents to make use of them in neutral waters, by prohibiting warlike operations therein. As things stand at present the hostile parties may strew them over the high seas and sow them broadcast in their own territorial waters and those of their foes. * * *

"We have seen that unanchored mines may be used if they become harmless within an hour after escaping from the control of the person who laid them. Does control exist when a string of mines is attached to the free end of a tow rope several miles in length? If so, it does not mean power to regulate movement and prevent injury to innocent vessels. The simple requirement of harmlessness within an hour of being placed in the water would have been much more efficacious. * * *

"The Institute of International Law has discussed the question three times since the second Hague Conference sat. In 1911 at Madrid it decided against the closure of an enemy's ports by mines alone. In 1908 at Florence, and again in 1910 at Paris, it agreed on the prohibition of both anchored and drifting mines on the high seas. This is the only formula of safety for neutrals in oceanic voyages. The waters that are a scene of conflict at one moment are a highway of peaceful passage the next. No precautions can make sure that every floating mine put into the waves during an engagement becomes innocuous soon after, and no rules can secure the universal observance of precautions in the excitement of a battle. Anchored mines placed in shoal water to protect a stationary fleet or block a channel remain as engines of death after the fleet has departed. When a particular use of the high seas for war renders them dangerous for purposes of peaceful intercourse, and there are no outward indications of the peril to warn off innocent passers-by, the warlike use should be forbidden in the interest of humanity. The territorial waters of bel-

ligerents require different treatment; but combatants ought to be forbidden to use in them means of destruction that may take effect outside without giving warning of their presence. This involves the prohibition of unanchored mines, since the experience of the Russo-Japanese War shows that they may drift out to sea by hundreds and destroy neutral life and property at a great distance from the scene of conflict. The loss of their noxious properties after immersion for a given time cannot be guaranteed in every case, and if only a few exploded against the sides of neutral vessels the results could be deplorable. Anchored mines can without difficulty be constructed so as to become harmless as soon as they have broken adrift from their moorings. But there is no security that they will not drag their anchors; and the danger that this should happen unobserved is considerable when such mines are laid along a coast-line which is not constantly watched because it is free at the moment from active operations. It would, therefore, be wise to prohibit the use of anchored mines in the territorial waters of the belligerents, except for the attack and defence of fortified places, and in such cases they need not be confined strictly to territorial waters, but might be allowed within the zone of active operations. The presence of the opposing forces would constitute ample warning to neutral vessels. Any of them that approached the lines of the combatants would do so at their peril, just as much as if they attempted to steam between the squadrons of a fleet in action.

"If the prohibitions just suggested were adopted, the question of the use of mines in blockades would be incidentally solved. Ordinary commercial blockades would be confined, as before, to ships: but in strategic blockades, when the reduction of the place blockaded was the ultimate object of the blockaders, anchored mines would be allowed within the zone of action of the blockading force. The case of narrow straits connecting two open seas remains to be considered. On the general principle of freedom of navigation for peaceful vessels, no mines should be allowed in them, even when all their waters are territorial, for none could be laid without the most imminent danger to passing craft. On the other hand, it seems impossible to forbid a belligerent to defend with anchored mines an important port situated, like Constantinople, on the shore of one of these straits. Perhaps it would be best to leave such places to the operation of the suggested rule which allows the use of anchored mines in the attack and defence of fortified coast towns, but to prohibit any further use of mines in the straits in question. * * *

"The process of reasoning we have just been through would give us a very simple set of regulations. They may be summed up in a sentence. No mines of any kind on the high seas, except when active operations against a fortified port extend beyond marginal waters; no drifting mines anywhere; no anchored mines except in attack or defence of a stronghold situated on the shore, and then all such mines to be so made as to become harmless the moment they break adrift. But these rules must be held to apply to existing circumstances only. If, as does not seem altogether improbable, mines are rendered dirigible from a distance by invisible and impalpable forces, they will no longer be indiscriminate in their action, but will have become projectiles directed by the will of man. In that case

the only rule required for them will be that which is already in force as regards torpedoes. They must become harmless when they have missed their mark."

Lawrence, pp. 534–538.

"A new mode of attack which requires special attention is that by means of floating mechanical, in contradistinction to so-called electro-contact, mines. The latter need not specially be discussed, because they are connected with a battery on land, can naturally only be laid within territorial waters, and present no danger to neutral shipping except on the spot where they are laid. But floating mechanical mines can be dropped as well in the Open Sea as in territorial waters; they can, moreover, drift away to any distance from the spot where they were dropped and thus become a great danger to navigation in general. Mechanical mines were for the first time used, and by both parties, in the Russo-Japanese War during the blockade of Port Arthur in 1904, and the question of their admissibility was at once raised in the press of all neutral countries, the danger to neutral shipping being obvious. The Second Peace Conference took the matter up and, in spite of the opposing views of the Powers, was able to produce the Convention (VIII.) concerning the laying of automatic submarine contact mines. * * *

"There is no doubt that the stipulations of Convention VIII. are totally inadequate to secure the safety of neutral shipping, and it is for this reason that Great Britain added the following reservation in signing the Convention:—'In placing their signatures to this Convention the British plenipotentiaries declare that the mere fact that the said Convention does not prohibit a particular act or proceeding must not be held to debar His Britannic Majesty's Government from contesting its legitimacy.' It is to be hoped that the Third Peace Conference will produce a more satisfactory settlement of the problem."

Oppenheim, vol. 2, pp. 227, 228, 229.

"'Anyone who has seen what happens even in peace manœuvres, when mines are laid for a brief period in unenclosed water, will know the impossibility after only moderately bad weather of ensuring that the mines will remain in place. It is quite common to find that some have shifted their position considerably. Mines laid in the outer anchorage of Port Arthur or at Dalny, and in the bays of either side of the Liautung Peninsula, whether by the defenders or the assailants, are likely enough to break adrift in such gales as are common in the spring in the locality in question: and some of them would probably drift out into the open sea.' Admiral Sir Cyprian Bridge, in the Times, of 30 May, 1904. His prophecy has been amply fulfilled."

Westlake, vol. 2, p. 312, note.

In respect to the general subject matter of this Convention, Hague VIII, Westlake says:

"There is no certainty that floating mines, even if anchored at first, will not get loose, nor even much probability that a large percentage will not get loose. Thus the employment by a belligerent, even in his own territorial waters or in those of his enemy which

merchantmen may be expected to avoid during war, of contact mines which do not become innocuous as soon as they get loose, is a cause, lying well within the limits of human foresight, of slaughter and damage to peaceable neutrals engaged in their lawful occupations in waters where they have a perfect right to be. During all the two years which have elapsed since the close of the Russo-Japanese war [to 1907], the seas of the Far East have continued to be the scene of disasters which the employment of such mines in that contest has caused to peaceful shipping and fishermen. Now the right of a state in the waters subject to its sovereignty can certainly not rank higher than that of a private owner in the land or water which is his property. Still less, if possible, can the right of a state in the open sea, which is free to the use of all, rank higher than that of property. But no principle is more firmly established in the science of law than that which says to an owner *sic utere tuo ut alienum non laedas*. The right of sovereignty therefore does not extend to employing anywhere what may be foreseen to be engines of slaughter and damage to unoffending foreigners. The foreign government whose subjects suffer from such engines does not need to enquire whether their use is prohibited by any positive rule of international law, whether resting on recognised custom or on agreement. They are indefensible in themselves, and the foreign government concerned will be justified, not only in taking up the cause of its injured subjects, but even in interfering in order to stop the offending methods of war.

"At the opening of the Conference of 1907 Great Britain proposed that the employment of unanchored automatic submarine contact mines, or of any contact mines which do not become innocuous as soon as they get loose, shall be prohibited; also that no contact mines at all shall be allowed except in the territorial waters of a belligerent or his enemy, or within a distance of ten miles from the shore batteries of a military port. Japan and Italy pleaded the usefulness of loose contact mines for ships which are being pursued, and proposed that they should be allowed on condition of their becoming innocuous within a fixed time, by accepting which on behalf of the British delegation Captain Ottley gave full scope to a spirit of conciliation. Brazil and the Netherlands wished that neutrals should be allowed to protect their own waters by contact mines, but Captain Ottley replied that electric mines would suffice for that purpose. Russia proposed to qualify the condition of becoming innocuous by inserting 'as far as possible.'"

Westlake, vol. 2, pp. 312, 313.

"At one stage of the prolonged proceedings Germany offered to agree to a prohibition of all use of floating mines for five years in place of any permanent rule, which can scarcely be otherwise interpreted than as indicating an opinion that war within five years was not probable, but Great Britain did not accept the offer."

Westlake, vol. 2, pp. 313, 314.

"The Russo-Japanese War drew the attention of the world to the deadly results produced by floating mines." They "were employed * * * by both belligerents, and hundreds either broke adrift from their moorings or, not being anchored at all, floated into the high

seas and caused serious loss of life to neutrals long after the conclusion of the war. In the course of the discussion of the British proposals in Committee the Chinese delegate made the following declaration which brings out strongly the dangers to which neutral shipping is exposed by their employment: * * *

"'The Chinese Government is even to-day obliged to furnish vessels engaged in coastal navigation with special apparatus to raise and destroy floating mines which are found not only on the open sea but even in its territorial waters. In spite of the precautions which have been taken a very considerable number of coasting vessels, fishing boats, junks and sampans have been lost with all hands without the details of these disasters being known to the western world. It is calculated from five to six hundred of our countrymen engaged in their peaceful occupations have there met a cruel death in consequence of these dangerous engines of war.'" * * *

"Referring to the loss of life occasioned in the China Seas which were frequented by a comparatively small number of ships he [Captain Ottley, British naval delegate] said that had the number been anything like that frequenting the entrance to the Baltic, the Dardanelles, the Straits of Gibralter or Dover a series of catastrophes would have occurred which would have attracted the attention of the whole civilized world."

Higgins, pp. 328–330.

"Automobile torpedoes were practically excluded from the discussions [of Hague Convention VIII]: They were referred to only in the 1st Article of this Convention; the lengthy debates in the Committees were all concerned with submarine mines. Mines are of three different kinds: (1) Observation mines which are anchored along the coast and connected therewith by wires by which they can be exploded electrically. These are not dealt with in the Convention. They are innocuous to peaceful shipping. (2) Anchored automatic contact mines which are attached to heavy weights, and which can be placed at any required depth below the surface; these mines are exploded automatically by contact with heavy bodies such as ships. (3) Unanchored automatic contact mines which also explode by contact."

Higgins, p. 328.

In the discussions in the Committee considering Hague Convention VIII (1907) great difficulty was experienced in reaching an agreement. In addition to a set of rules proposed by the British delegation, three different sets of rules were considered in committee before an agreement could be reached.

In the course of the discussions the Italian naval delegate "pointed out that mines provided a cheap form of defence for states with a weak navy, and that those possessing a large navy and a long coast line also found them a valuable assistance to their coastal defences. The danger to neutrals was however so great that it was natural that a limit should be imposed on the unrestricted use of such terrible instruments of destruction, and he asked for the acceptance of his preliminary amendment to the British proposals as neutrals were safeguarded while a belligerent could still use a weapon which

might as a last resort, especially where a weaker vessel was being pursued by a stronger, prove its salvation."

Higgins, p. 331.

During the discussion of the first Committee draft, Admiral Siegel. German naval delegate, "drew attention to the great diversity of opinion manifested in the Examining Committee and the fact that none of the Articles were unanimously adopted. The question in his opinion was not ripe for solution; that attempted was not satisfactory. He then passed to a criticism of the draft, particularly the limits imposed on the area of mine-laying operations, and urged that the restriction to territorial waters did not meet the case of the defence of a blockaded coast by mines which to be effective must be laid near the blockading squadron lying perhaps 20 miles or more off the land. Nor could he accept the rule that *unanchored* mines must be rendered innocuous within a given length of time. That principle was sound as regards *anchored* mines which broke loose from their moorings but the limit of one hour was useless where a weak naval force was flying from a stronger and dropped unanchored mines in defence.

"Sir Ernest Satow followed in a lengthy and detailed criticism of the draft which he contended was quite inadequate as a safeguard to legitimate neutral rights. The permission to belligerents to lay mines anywhere in 'the sphere of their immediate activity' was a permission to strew the high seas with mines. On the outbreak of war a catastrophe to a neutral ship would at once create a situation which in all probability diplomacy would be impotent to solve; if therefore the draft were adopted the Conference instead of diminishing would increase the causes of war. He strongly urged that the Conference ought only to allow belligerents to lay anchored mines in their own territorial waters or those of their adversary and then only if they became harmless as soon as they broke loose; that belligerents should only be allowed to use floating mines during a battle on condition that they became harmless within a short period; that anchored mines should not be allowed beyond territorial waters or more than 10 miles off military ports, etc., otherwise the navigation of a great part of the Baltic, the North Sea, the Mediterranean, etc., might all be rendered full of dangers beyond these limits. for the provision that anchored mines should be rendered harmless within two hours after they were laid was impracticable. The prohibition to lay mines outside belligerent ports to intercept commerce was equivocal as appearing to countenance blockade by mines which was contrary alike to the spirit and letter of the Declaration of Paris. The British proposal in regard to 'ports de guerre' was preferable. Finally he proposed to extend the duration of the Convention for seven years or until the end of the Third Peace Conference.

"Baron Marschall von Bieberstein (Germany) supported the views of Admiral Siegel. He said Germany did not mean to demand an unlimited liberty in the use of mines or desire to 'sow mines in profusion in all the seas'; he fully admitted the great responsibility of belligerents in their use of mines. Germany, to show her desire to conform to public opinion, was willing to forbid the use of floating (unanchored) mines for five years, and he concluded by moving an amendment to the first Article of the draft to this effect." * * *

At the time of the adoption of the final draft at the Plenary Meeting of the Conference, the following declaration was made by Sir Ernest Satow on behalf of the British delegation:

"'Having voted for the Mines Convention which the Conference has just accepted, the British Delegation desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the Convention of the right of neutrals to protection, nor of humanitarian sentiments which cannot be neglected; it has done all that is possible to bring the Conference to share its views, but its efforts in this direction have remained without result.

"'The high seas, Gentlemen, are a great international highway. If in the present state of international law and custom belligerents are permitted to fight their battles there, it is none the less incumbent on them to do nothing which might, long after their departure from a particular place, render this highway dangerous to neutrals who have an equal right to use it. We declare without hesitation that the right of the neutral to security of navigation of the high seas ought to take precedence of the transitory right of the belligerent to employ these seas as the scene of the operations of war.

"'This Convention, however, as it has been adopted, imposes on the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defence, in the waters of the enemy as a means of attack, or lastly on the high seas, so that neutral navigation will inevitably run great risks in time of naval war and may be exposed to many a disaster. We have already on several occasions insisted on the danger of a situation of this kind. We have endeavoured to show what would be the effect produced by the loss of a great liner belonging to a neutral Power. We have not failed to produce every argument in favour of limiting the field of action of these mines, while we called special attention to the advantages which the civilised world would gain from this restriction, as it would diminish to a certain extent the causes of armed conflicts. It appeared to us that by accepting the proposal made by us at the beginning of the discussion dangers would have been obviated which in every maritime war of the future will threaten to disturb friendly relations between neutrals and belligerents. But since the Conference has not shared our views, it remains for us to declare in the most formal manner that these dangers exist and that the certainty that they will make themselves felt in the future is due to the incomplete character of the present Convention. As, in our opinion, this constitutes only a partial and insufficient solution of the problem, it cannot, as has already been pointed out, be regarded as a complete exposition of international law on the subject. Therefore the legitimacy of a given act can not be presumed for the mere reason that the Convention has not forbidden it. That is a principle which we desired to affirm, and which could never be ignored by any state, whatever its power.'

"Baron Marschall von Bieberstein replied as follows:

"'In view of the declaration just made by His Excellency the delegate of Great Britain, I wish to repeat what I have already said in the Committee.

"'A belligerent who lays mines assumes a very heavy responsibility towards neutrals and peaceful shipping. On that point we are all agreed. No one will resort to such means unless for military reasons of an absolutely urgent character. But military acts are not governed solely by principles of international law. There are other factors: conscience, good sense and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I emphatically affirm (*je le dis a voix haute*), will always fulfill, in the strictest fashion, the duties which emanate from the unwritten law of humanity and civilisation.

"'I have no need to tell you that I recognise entirely the importance of the codification of rules to be followed in war. But it would be well not to issue rules the strict observation of which might be rendered impossible by the force of things. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view, even in exceptional circumstances. Otherwise the respect for law will be lessened and its authority undermined. Also it would seem to us to be preferable to preserve at present a certain reserve, in the expectation that, seven years hence, it will be easier to find a solution which will be acceptable to the whole world.

"'As to the sentiments of humanity and civilisation, I cannot admit that there is any government or country which is superior in these sentiments to that which I have the honour to represent.'"[1]

Higgins, pp. 334–342.

Higgins in his work on the Hague Peace Conferences has the following criticism to offer in respect to the results of this Convention:

"The declaration of Sir Ernest Satow and the speeches made by the British, Japanese and Chinese delegates during the various discussions draw attention in a striking manner to the defects of the Convention. Baron Marschall's contention that conscience, good sense and the unwritten law of humanity and civilisation afford a better guarantee for the observance of international law than a Convention is unconvincing. States are not content to rely on such principles for the maintenance of internal order; life and property are safeguarded by definite enactments embodying the old commands 'Thou shalt not kill, thou shalt not steal.' The interests of neutrals demand that the law of humanity and civilisation in a matter in which they are so deeply concerned should also form part of the written law of nations though the absence of the *litera scripta* cannot be adduced to justify proceedings against this unwritten law. It is impossible to underestimate the risks to neutrals from the use of mines in ways not prohibited by this Convention. There is nothing in its provisions to forbid a belligerent placing mines, floating or anchored, on the high seas; nothing to prohibit him from placing mines off the coasts of the enemy without regard to neutral shipping, for the proviso that danger zones shall be notified 'as soon as military exigencies

[1] Referring to this speech of de Bieberstein, Westlake says: "Thus Germany claims the right to destroy neutral shipping and fishermen, if absolutely necessary in order that she may win in a war: Great Britain declines to be bound by Germany's necessity to win. We must repeat our conclusion that to deny the sufficiency of the British answer cannot be reconciled with there being a law between states as equals." Westlake, vol. 2, p. 316.

allow' is of little value. The prohibition of the use of mines off the coasts of the enemy with the sole object of intercepting commercial shipping, is, as has been pointed out, futile, for a belligerent has only to allege a different object to make it illusory and none of the safeguards which the laws of blockade require in the interests of neutrals are mentioned in this Convention. The prohibitions contained in the first Article are in effect nullified by the sixth, for no time is specified within which states are to cause their *matériel* to conform to the requirements of Article 1, and where neutrals suffer from the use of imperfectly constructed mines it is not likely that they will be satisfied with the belligenent's plea that he has been prevented by lack of funds or time from making the needful changes.

"Neutrals have a right to demand that the high seas, the great international highway of all nations, shall be protected from belligerent operations to their detriment, and it was with this object that the British proposals were framed. They were not accepted, and Sir Ernest Satow's declaration is a clear notification that the Convention is wholly inadequate as a guarantee of neutral interests, and also that the legitimacy of acts such as those above mentioned cannot be presumed merely because a Convention has not forbidden them."

Higgins, pp. 343–344.

"The fate of the proposal deposited by the Dutch delegate in reference to the laying of mines in straits must be mentioned. The Dutch naval delegate (Admiral Röell) desired that the prohibition of mine-laying in straits connecting the high seas should be clearly enunciated in the interests of neutrals. The right of innocent passage was generally admitted, he said, but it was desirable that the principle should be definitely adopted in a conventional stipulation, clearly providing that straits should not be barred in such a way as not to leave communication open to peaceful navigation. The Japanese, United States, and Turkish delegates all made reservations as regards the Islands of the Japanese Empire, the Philippines, the Bosphorus and the Dardanelles which form integral parts of their respective states. The German and Spanish delegates stated that they had no instructions on the subject, and the Russian naval delegate (Captain Behr) expressed doubts as to the competence of the Conference to deal with the question. The Dutch proposal, he said, laid down a general rule for all straits. Certain straits are dealt with by international agreements based on political considerations and these were outside their competence; it would be unwise to lay down general rules for some straits, leaving out others, as thereby a new source of difficulty would be occasioned. He concluded by saying that he was instructed to state that the consideration of the question was not competent to the Conference and that he should not take part in the discussion. The Committee therefore decided to suppress all provision relating to straits. The Report by M. Streit to the Conference states that it was clearly understood that nothing was changed by the Convention as regards the actual situation of straits. 'But, it has been considered as natural that the technical conditions established by the Regulations should be of general application.'"

Higgins, p. 339.

Lawrence, War and Neutrality in the Far East, (2nd Ed.) pp. 93–111, contains the following extended discussion of the rights and duties of belligerents in their use of mines in a naval war:

"A discussion on a moot point of neutral procedure when navigating the high seas, leads naturally to a further discussion of certain matters connected with belligerent procedure in the open waters which are part of the common highway of all nations. The question, or rather the group of questions, to which we refer, grew out of the sinking of the Japanese battleship *Hatsuse*, by a marine mine on May 15, when she was cruising ten miles south-east of Port Arthur, and therefore out on the high seas a considerable distance beyond Russian territorial waters. A month before, on April 13, a Russian battleship, the *Petropavlovsk*, had been destroyed by a Japanese mine or mines. But as the catastrophe took place in the outer roadstead of Port Arthur, and at no very great distance from the shore, it was felt to be a legal, though terrible, incident of warfare. No one disputes the right of belligerents to lay mines in their own territorial waters, or those of their foes, as a means of strengthening the defences of harbours, or assisting attacks upon them. But when the area of destruction is extended to the high seas, questions of legality immediately arise. The sinking of the *Hatsuse* was discussed at once by the press of the civilised world. The general impression seems to have been that the Russians created a mine-field in the open sea, or deliberately turned mechanical mines adrift in all the waters to which they had access. Under the impression that these views were correct, Russian methods were vehemently denounced, and Russian officers charged with a gross violation of International Law. In the United States the chorus of condemnation was especially loud; but the American Government wisely refrained from making representations before it was sure of the facts, and instructed its naval attaches abroad to inquire into the matter.

"Pending the results of inquiries and diplomatic representations of a formal or informal character, it may be useful to discuss the probabilities of the case. The ordinary observation mine which is fired from the shore by an electric current, when the enemy is seen to have come within the area of its operation, could not be anchored without great difficulty, if at all, in water as deep as that in which the *Hatsuse* sank. Moreover, the adjustment of such mines, and their connection with the observation-station on land, would require more time for uninterrupted work than is likely to be given to Russian marine engineers by the Japanese vessels engaged in watching Port Arthur. Electro-contact mines explode of their own accord when struck; but they have to be connected with a battery on shore, and the explosion takes place because the impact of the vessel which strikes them completes the electric circuit. They, too, could not be laid in deep water at any time without much trouble and great expense; and in the middle of last May, off the Kwangtung peninsula, the element of danger from the enemy would obtrude itself in a marked manner. We are, therefore, almost forced to the conclusion that the agent of destruction employed against the *Hatsuse* was a mechanical mine, which would explode, when struck, through some internal action, and would not be connected with the shore. It is just possible that the fatal blow may have been struck by a torpedo

travelling at low speed and discharged at a great distance, or a submarine may have been used. There are vague reports of the existence of one or two vessels of this kind at Port Arthur; but no trace of them has ever been discovered by the Japanese, and it is exceedingly improbable that any such craft are among the defences of the Russian stronghold. Moreover, the crew of any submarine which had won for its country the greatest success that had been obtained since the commencement of the war would long ago have been honoured and decorated; and the same may be said of those who discharged the torpedo, if it was by that means that the Japanese battleship was sent to the bottom. The more the matter is considered, the more we seem thrown back upon mechanical mines as the agents of destruction. The question, then, arises, How did they come to be on the spot? Were they moored to the bottom, or were they adrift?

"The former alternative is possible, but not probable. The difficulties in the way of anchoring mechanical mines in deep water are almost insuperable, and the charts show that the sea is of considerable depth ten miles from Port Arthur in the region where the *Hatsuse* sank. We cannot pretend to any certainty in the matter till further information is at our disposal; and even when official reports reach us, they may not agree. To this day there is no general consensus of opinion as to the cause of the explosion which sent the United States battleship, the *Maine*, to the bottom of the harbour of Havana early in 1898; and there exist two contradictory reports from two commissions of experts. But such evidence as we possess tends to discredit the theory of a prepared mine-field, with its lines of buoyant mines, all carefully placed at the proper intervals, and secured so as to float at the proper depth below the surface.

"All other views being unlikely, we seem driven by a process of elimination to the idea that a mechanical mine left adrift was the agent of destruction in the case before us. There is ample evidence that many such mines were floating in the Korean Bay and the Gulf of Liau-tung about the time when the catastrophe occurred. On May 21 the correspondent of the Times on board the *Haimun* saw two within six miles of the British port of Wei-hai-Wei. Reports are current that the garrison of Port Arthur determined in their desperation to use up their stock of these terrible machines in a last reckless endeavor to damage the enemy, regardless of the risks and hazards caused thereby to neutral shipping. They therefore, so the story runs, employed Chinese junks to drop them at night in waters likely to be crossed by the squadrons of Japan. This may be a true tale, but it sounds like one of those marvellous pieces of information which are supplied to us from time to time by the gossip of Shanghai or Tientsin. Mechanical mines are very expensive, and it is not likely that the Russian naval commander in Port Arthur had enough of them in hand to enable him to sow them broadcast over the high seas. We must remember that many had been used in the earlier stages of the struggle, and many more lost. On February 11 the steamer *Yenesei* was blown up in Dalny Bay. She was a Russian store-ship employed in laying mines. She had placed 389, and was herself destroyed by the 390th. According to a correspondent of the New York Herald at Chifu, the 389 were soon after blown out to

sea by a great storm. If this be correct, or even partially correct, a good many of the floating mines which infest the neighboring waters are accounted for. Then we must remember that ever since the war began both belligerents have been mining all round the coast of the peninsula on which Port Arthur stands. As the Japanese pressed their attacks more closely home, they constantly endeavoured to remove the Russian mines, and lost two or three ships in the process. We know from a telegram sent by Admiral Alexeieff to the Czar that 'up to May 28 numerous Japanese mines were discovered and exploded in the roadstead.' Both parties, therefore, have been hard at work removing each other's infernal machines, and it would be strange indeed if some of them did not get adrift in the course of the dredging operations. We can therefore account for stories brought back to port by frightened merchantmen, without restoring to the supposition that Russia has deliberately strewn the high seas with hidden dangers. We must not, however, forget Admiral Togo's report, that when off Port Arthur on the morning of February 9, 1904, his course was altered in order to escape a mechanical mine some 8000 yards from land, or ignore his belief that mines were laid on the spot where the *Hatsuse* sank. The Japanese even name the Russian vessel which they accuse of doing the work.

"We pass now from conjecture about fact to discussion about law. Immediately we find ourselves face to face with a difficulty which is serious in all legal systems, and specially serious in that which is called International Law. There are no precedents. Mines are not new. They have been used on land since the introduction of gunpowder. But the first to employ them successfully at sea were the Confederates, who mined their harbours, and blew up several of the attacking or blockading ships. This was in the American Civil War of 1861–1865; and since that time vast improvements have been introduced in the apparatus of submarine defence. But though mining as an art has been revolutionised, the practice of it has been confined to the ports and territorial waters of belligerent powers. The recent case is the first in which a mine acted far out at sea. How is an unprecedented situation to be met in International Law? The first thing to be done is to see whether any universally admitted principles apply to it, and, if they do, to apply them. The next is to endeavour to bring about some measure of international agreement as to future treatment of similar situations. The best method for securing this is a Conference. One is due to codify the laws of warfare at sea, as the laws of warfare on land were codified at the Hague in 1899. But we must wait for it at least till the close of the present war, and probably a good deal longer. Meanwhile discussion tends to clarify opinion; and it is certain that no new chapter will be added to the law of nations till the general opinion of the civilised world has pronounced strongly in favour of it.

"International law regards as fundamental the distinction between the high seas and territorial waters. The former are the common highway of all nations. The only purpose for which they may not be used is piracy. Even the slave-trade cannot be put down upon them without an agreement between the states concerned. Belligerents are free to carry on their warlike operations in all parts of them; but neutrals are equally free to carry on their lawful

trade. Neither can set apart a zone of ocean into which the other may not intrude; yet neither can so use the right of passage as to interfere with the legitimate purposes of the other, among which purposes the operations of war must be reckoned. Wanton obstruction of one by the other is forbidden. There must be give and take on both sides.

"On the other hand, territorial waters belong to the state which owns the adjacent land, and are under its jurisdiction. It throws them open to the visits of ships of all powers with which it is at peace. But it is not bound to do so, the only absolute rights they can claim in the matter being a right of asylum when in danger of destruction from the violence of wind and wave, and a right of innocent passage when the water-way between two portions of the high seas passes through the territorial zone. Neutral waters are as free from warlike operations as neutral land. The belligerents may attack each other's ports, harbours, and bays, but with this their right to perform acts of war in territorial waters begins and ends. Their power of destruction is, however, more absolute there than on the high seas: because it is not conditioned by equal rights of navigation on the part of neutrals, and moreover it has a proprietary aspect which is permanent as to their own waters, and temporary as to those which they hold in warlike occupation. They may perform in such marginal seas acts of hostility which would not be tolerated in the open ocean. No objection has ever been taken against the use of weapons which command them from the land, however destructive they may be; and when marine mines were invented they were placed as a matter of course in the ports and harbours of states which expected attack from the sea. No explicit rule of International Law gave permission; but neither, on the other hand, could any prohibition be quoted. The accepted principles were extended by analogy to the new situation. Similarly, the attacking party used without question all the means which science placed at its disposal. Nothing came of the British protest in 1861 against the action of the Federal forces in blocking up some of the approaches to Charleston and Savannah by means of vessels sunk in the channels. Mr. Seward, the American Secretary of State, replied that the obstructions would be removed when the war was over and the Confederacy vanquished, and there the matter ended. In the present war no one, even in Russia, has hinted that the Japanese went beyond their rights in attempting to block the channel leading to the inner harbor of Port Arthur by sunken merchantmen, or in mining the seapathway which they had observed the Russian ironclads to take when going in and coming out.

"If it be right to extend admitted principles to new cases when they are concerned with territorial waters, it cannot be wrong to use them in like fashion when we are dealing with the open ocean. Here the rule is one of concurrent rights on the part of belligerents and neutrals; and there are no ideas of proprietorship to be reckoned with, for it is held that the high seas are incapable of appropriation. Surely this rule contains an implicit prohibition of the use of such means of destruction as shall prove a lasting danger to neutral vessels, when no measures of active hostility are going on in the neighborhood to act as a warning against approach. It has been construed from time immemorial to mean that neutral on-

lookers at a naval engagement are present at their own risk. It would be deemed to justify the capture, and even the destruction, of a neutral vessel which persistently hampered warlike operations. The Hague agreement for extending the principles of the Geneva Convention to maritime warfare expressly stated that belligerents might control and order off hospital ships. They might 'even detain them, if important circumstances require it.' If, then, warring fleets may order off, and in extreme circumstances destroy, neutral vessels which theoretically have as much right to be on the open ocean as they themselves have, conversely neutrals must be protected against the use of means of destruction which would do away with security of navigation, when issue of battle was not openly joined to be a sign to all and sundry that they approached the spot at their peril. The right to fight at sea, if it is to be conditioned, as heretofore, by the right to trade at sea, must be limited to fighting by open and avoidable means.

"We will now endeavour to apply these considerations to the questions which have arisen out of the destruction of the *Hatsuse*. If she was blown up by a torpedo, discharged at close quarters from a submarine, or at long range from the shore or a torpedo boat, there was no more violation of International Law than if her magazine had been exploded by a shell from one of the forts. The torpedo was aimed directly at her, and no neutral merchantman would have been in any danger, unless she had come much closer than such vessels ought to approach to fighting ships. If the agent of destruction was a floating mechanical mine, which had got adrift owing to one or other of the operations we have already described, it is difficult to say that any existing rule of law was broken, though one may ardently desire some strong restraint upon the carelessness which strews the sea with floating death. But if a mine-field was deliberately created out in the open ocean by the Russians, in such a position that it was as likely to destroy a peaceful neutral as an enemy's warship, words fail to express the reprobation with which the act must be regarded. It is not only illegal, but cruel in the highest degree. Neutral states would be justified in calling Russia to account very sharply, and stating their intention of claiming exemplary reparation should any vessels of theirs be lost in the mined areas. The argument that, if the Japanese fleet may bombard Port Arthur from a distance of eight miles, which is far outside territorial waters, the garrison of the fortress may reply by any form of counter-attack, misses the point completely. The forts have full liberty to return shot for shot. Torpedo-attacks may be made by any means which involve attempts upon the enemy's ships and no others. But the setting of a concealed death-trap in a place where it is as likely to injure neutrals as foes is a mode of warfare contrary to all former practice and to all sound principle. The evidence available at present hardly bears out the common idea that this was done, and without the clearest proof we should hesitate to believe that such an outrage was perpetrated. The still more horrible story of the employment of Chinese junks to dump cargoes of infernal machines down upon the open sea, careless of where they floated and whom they destroyed, supposes a defiant recklessness and a wicked disregard of human life which would be a disgrace to the most hardened

criminal. It is incredible without attestation infinitely stronger than vague reports.

"Professor Holland has pointed out, in his admirable letters to the Times on this subject, that it is not always easy to know where the line should be drawn between territorial waters and the high seas. There is general agreement with regard to the marine league; but this applies to the ordinary coast-line, and not to bays, estuaries, and indentations, to say nothing of narrow straits. Some of these are dealt with by special compact. In the absence of a definite agreement, what is called the ten-mile rule is often adopted. Under it, all within an imaginary line drawn from point to point across an inlet is territorial water, as long as the line in question is not more than ten miles in length; and all outside is part of the high seas, except that the marine league is measured from the imaginary line. We cannot, however, attribute universality to this rule. The whole subject needs reconsideration. There has sprung up of late years a strong body of opinion in favour of a large extension of territorial waters. The marine league was adopted when the utmost range of cannon was three miles. It is now about twelve; and in addition artillery fire is much more accurate and destructive than it was a century and a half ago. In 1894 the Institut de Droit International adopted at Paris resolutions in favour of the extension of the territorial zone to six miles, with power to a neutral state to claim further extensions for the purposes of protecting its neutrality, as long as they did not exceed the utmost range of cannon mounted on its shores. In the case of bays and inlets the ten-mile line was to be replaced by one of twelve miles. The events we have been describing will give an impetus to the movement for change. Nothing can be done without an International Congress, and at present the prospect of one seems remote. Even if it were assembled, the innate conservatism of some states would be overcome with difficulty. As late as June 2, 1904, Earl Percy, the Under-Secretary of State for Foreign Affairs, stated in the House of Commons that His Majesty's Government were not prepared to recognise any extension of the three-mile limit. The arguments in favour of enlarging territorial waters are very strong; but it will be necessary to proceed with caution, lest unexpected and unwelcome results follow upon changes which were meant to promote the general good. A better example could hardly be found than was recently given by Vice-Admiral Sir R. H. Harris, when he pointed out that if belligerents were allowed to lay mines up to a ten-mile limit from their shores, and England and France were unfortunately at war, life would not be worth living for the crews of neutral merchantmen who might attempt to navigate the Straits of Dover."

Moore's International Law Digest, vol. 7, pp. 366, 367, contains the following references to the use of mines:

(a) During the war in 1880 between Peru and Chile, the former country used "boats containing explosive materials, with the object of destroying the enemy's ships, and * * * in some instances these boats had been set adrift on the chance of their being fallen in with some of the Chilean blockading squadron." The British minister was instructed "'to protest in the strongest manner against a

practice which is fraught with so much danger to the vessels of neutral powers in the free navigation of the high seas, and to state that Her Majesty's Government will hold the Peruvian Government responsible for any damage which may be caused to British vessels by the practice in question.'"

The American minister was likewise instructed to make a 'strong representation' against the proposed practice and "to say that the United States must hold Peru responsible for any damage done to American vessels. A means of warfare so dangerous to neutrals, if it had been adopted, should, it was said, 'be at once checked, not only for the benefit of Peru, but in the interest of a wise and chivalrous warfare, which should constantly afford to neutral powers the highest possible consideration.'"

(b) During insurrectionary trouble in Brazil in 1893 commanders of foreign vessels asked that firing by insurgents cease in order that the harbor might be cleared of floating torpedoes. In reply to the request of the American minister for instructions as to whether he should join his colleagues to the end of securing like action on the part of the Government forts, he was instructed "'to join in the request, which should be made to both parties, if the floating torpedoes are proving a damage to neutral vessels, that they permit the removal of those torpedoes.'"

(c) The use of mines by the United States in the Spanish-American War in 1898 is set forth in the following excerpt from the annual message of the President to Congress on December 12, 1898:

"'Under the direction of the Chief of Engineers submarine mines were placed at the most exposed points. Before the outbreak of the war permanent mining casements and cable galleries had been constructed at nearly all important harbors. Most of the torpedo material was not to be found in the market, and had to be specially manufactured. Under date of April 19, district officers were directed to take all preliminary measures, short of the actual attaching of the loaded mines to the cables, and on April 22 telegraphic orders were issued to place the loaded mines in position.

"'The aggregate number of mines placed was 1,535, at the principal harbors from Maine to California. Preparations were also made for the planting of mines at certain other harbors, but owing to the early destruction of the Spanish fleet these mines were not placed.'"

Accompanying the notice given by the United States of the placing of mines were regulations for the navigation of the mined harbors.

Stockton in his article on "The use of submarine mines and torpedoes in time of war," vol. 2, American Journal International Law, p. 276, classified this means of floating defense and offense as follows:

"1. Automobile torpedoes, which are projected both from shore stations and from vessels of various sizes against the vessels of the enemy in the course of a naval action.

"2. Submarine mines which float in water-tight cases and are anchored along the coasts and in and off harbors, and which are generally exploded at will from shore by electrical apparatus and cables.

"3. Submarine mines which are floating, either anchored or drifting, whose explosion is caused automatically by contact.

"This latter type can be placed rapidly in large numbers and the mines are intended to be exploded by a simple shock arising from the contact with an enemy's vessel. It is this type which is so dangerous to friend as well as to foe, and submarine mines of this class were especially the subject of the discussion at The Hague. Such floating contact mines, when beyond the control of the belligerent using them, or which have broken adrift from their moorings, carry great danger with them on the high seas to neutral and pacific commerce and lives. This sea area should be free and open to all nations and its liberty has been definitely established by common consent and the law of nations for centuries. In this way, directly and indirectly, has arisen a conflict between the new conditions of sea warfare and national defense and the principles of the freedom of the seas. No subject assigned to the Hague conference seems to have required a settlement and reconciliation more than this one, with its two varying requirements. The dangers arising from the use of these automatic contact submarine mines are not of an imaginary nature. In the operations about the Liaotung Peninsula, * * * the fatalities from such mines not only extended to a great distance from the actual scene of operations, but in time outlasted these operations and also the duration of the war. * * *

"It will, however, have to be considered that submarine mines constitute not only an effective but a comparatively inexpensive means of defense for nations possessing extensive coast lines and small navies as against great naval powers. This system of maritime defense appeals in consequence to the less powerful countries as a ready and economical defense against arbitrary naval strength, and considering, therefore, the fact that in the Hague conference of 1907 the membership was mostly held by weak naval powers it is not to be wondered that considerable opposition and conservatism was shown with respect to the propositions of Great Britain as a representative of great maritime power. On the other hand, the Colombian proposition to restrict the use of submarine contact mines for defensive purposes alone naturally came more nearly within the range of success. It is very probable that if it were possible to differentiate exactly between offensive and defensive operations of this nature the employment of such mines would have been so restricted. The endeavor to substitute for submarine contact mines those exploded only at will by means of electricity met with failure also, both on account of the want of readiness in the placing of such mines and the restricted distance from the shore at which such mines could be effectively used. Vessels of the enemy lying beyond their placement could easily, with the range of modern weapons, destroy or injure by gun fire in safety the shipping, resources, and defenses of the ports under attack."

"The first article [of the Hague Convention VIII, 1907] seems to be clear and intelligible in its phrasing and to be the best thing possible under the circumstances. It was stated by experts present that it had been demonstrated by experiment that the drifting mines referred to in the first two paragraphs of this article could be rendered harmless in the times mentioned. One method was by making a hole

in the case of the mine and filling it with a soluble substance like sal ammonia, which in a certain time would drown the charge and sink the mine. Another method proposed the same effect by galvanic action. Automobile torpedoes of the present day are so arranged as to follow the conditions of the third paragraph, so no novelty is here prescribed."

Stockton, Amer. Journal International Law, vol. 2, p. 283.

"164. You will likewise act in conformity with the provisions of Convention VIII of the Hague of October 18, 1907, relative to the laying of automatic submarine contact mines."

French Naval Regulations, 1912.

Article 1, Hague VIII, 1907, substantially appears as Art. 65 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

AUTOMATIC CONTACT MINES NOT TO BE LAID OFF ENEMY COAST AND PORTS SOLELY TO INTERCEPT COMMERCIAL SHIPPING.

It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.—*Article 2, Hague VIII, 1907.*

"ARTICLE 4. A belligerent is allowed to lay mines off the coasts and ports of the enemy only for naval and military purposes. He is forbidden to lay them there in order to establish or maintain a commercial blockade."

Institute (1910), p. 167.

"ARTICLE 22. A belligerent may not lay mines along the coast and harbors of his adversary except for naval and military ends. He is forbidden to lay them there in order to establish or to maintain a commercial blockade."

Institute (1913), p. 178.

Article 2 of Hague VIII, 1907, substantially appears as Art. 66 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The restriction contained in this article "is illusory" as "a naval commander can always allege some other object, and by this means secure unrestricted liberty to close a commercial port by mines laid secretly under cover of night or fog. The port would be practically blockaded by unseen instruments of destruction, and death would be the penalty of an unsuccessful attempt to enter it. It might well happen that the first victims were the passengers and crew of a neutral liner which was making for the accustomed terminus of her voyage in ignorance that it was no longer open. Such a catastrophe would horrify the civilized world. But the authors of it could claim that they were within the terms of the Convention, if they were able to show that the port contained a war-ship, however weak and antiquated, whose exit it was desirable to prevent, or that there was any danger, however remote, of the entry of an enemy cruiser. Thus a new and horrible form of blockade might be foisted into naval warfare, just at the time when the old blockade by means of ships was being placed under mild and humane international regulations."

Lawrence, p. 534.

The closing of an enemy's ports by automatic contact mines placed secretly "and left without warning to destroy the first ship that passed in or out * * * would be outrageous in itself, and in its consequences most dangerous to neutrals." Such a closing "could not be brought under the law of blockade, which presupposes ships, as a marriage presupposes a bride or a sale a vendor. The only position it could occupy would be that of a new and nameless horror which ought to be banned forthwith by the emphatic condemnation of the civilized world."

Lawrence, p. 686.

Article 2, Hague VIII, 1907, "not to mention that both Germany and France have excepted it from their acceptance of the convention, is futile, whether from the point of view of commercial blockades, which it would always be easy to establish by mines while pretending some other object, or from that of the danger which the mines would cause to innocent shipping in other waters."

Westlake, vol. 2, p. 316.

This "article [2 of Hague Convention VIII, 1907] has been criticised both by British and German authorities as capable of allowing an evasion or using some pretext that may come within the inventive ingenuity of the commanding naval officer. The principle to my mind is well established by the wording of the article; its violation would be a very serious matter, involving as it would, in all probability, more danger to neutrals than to belligerents. I must confess that I think the high sense of honor to be expected from the naval officer in command in such case would not be wanting in any civilized naval force."

Stockton, vol. 2, Amer. Journal International Law, p. 283.

Referring to the reservation made by Germany to this article, Admiral Stockton says:

"Although the failure to vote favorably for this proposition was explained by Baron Marschall de Bieberstein on account of the use of the word 'seal' ("seul"?) and the introduction of a subjective element or an evasion, an impression has been formed, probably unjustly, that Germany, from its action here and upon other propositions, looked favorably upon a commercial blockade of an enemy's port by submarine mines alone. This, of course, would be in contravention of the Declaration of Paris and mark a retrogression in maritime warfare."

Vol. 2, Amer. Journal International Law, p. 280.

MEANS TO BE TAKEN BY BELLIGERENTS TO PROTECT PEACEFUL SHIPPING FROM AUTOMATIC CONTACT MINES.

When anchored automatic contact mines are employed every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.—*Article 3, Hague VIII, 1907.*

In discussing a proposition to restrict the laying of submarine mines to hostile waters in which the enemy is exercising effective power, the report to the Commission, of the Committee on Examination, at the Hague Conference, quotes Vice Admiral Roell, delegate of the Netherlands, as saying:—"Naval war has for its aim to cause the greatest possible damage to the hostile ships in order to bring the war to an end as soon as possible.

"One of the principal means is to obstruct the hostile ships in their maneuvers, for example, by preventing them from leaving their port by laying mines and at the same time giving more liberty of movement to one's own vessels. If we limit the laying of mines to maritime zones where effective power is exercised we shall certainly injure operations of an offensive nature on the theater of war, but this will be going beyond the Spanish proposal which has only for its object safeguarding neutral ships without at the same time hindering the operations of the belligerents."

Second Hague Conference, Acts and Documents, vol. 3, p. 414.

"ARTICLE 5. When anchored or unanchored automatic contact mines are used, all precautions must be taken for the security of peaceful navigation.

"Belligerents shall, in especial, provide that the mines become harmless within a limited time.

"In case the mines cease to be under their observation, the belligerents shall, as soon as military exigencies permit, notify the danger zones to mariners and also to the Governments through the diplomatic channel."

Institute (1910), p. 167.

"ARTICLE 23. When automatic contact mines, anchored or unanchored, are employed, every precaution must be taken for the security of peaceful shipping.

"The belligerents must do their utmost to render these mines harmless within a limited time.

"Should the mines cease to be under surveillance, the belligerents shall notify the danger zones as soon as military exigencies permit, by a notice addressed to ship-owners, which must also be communicated to the Governments through the diplomatic channel."

Institute (1913), p. 179.

This article contains one of the "loopholes" in which the Convention "abounds." "When anchored mines cease to be under observation the belligerent who laid them must notify the danger zones by means of a warning to mariners which must also be communicated diplomatically to governments—an excellent rule, but deprived of nine-tenths of its force by the saving clause 'as soon as military exigencies will permit,' which means in effect after the mines have done their deadly work on some one, whether combatant or non-combatant, belligerent or neutral, apparently does not matter much."

Lawrence, p. 535.

The only dissent to article 3, Hague Convention VIII, 1907, was that of Turkey. "The Turkish delegate stated that in view of the exceptional situation created by treaties now in force with regard to the Dardanelles and the Bosphorus, straits which are integral parts of its territory, the Turkish Government would not assume any engagement whatever that would restrict the means of defense that it might judge to be necessary for these straits in case of war, or for the purpose of causing respect for their neutrality."

Stockton, Amer. Journal International Law, vol. 2, p. 281.

Article 3, Hague VIII, 1907, substantially appears as Art. 67 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.— *Article 4, Hague VIII, 1907.*

"ARTICLE 6. A neutral State may lay mines in its territorial waters for the defense of its neutrality. It should, in this case, observe the same rules and take the same precautions as are imposed on belligerents.

"The neutral State should inform ship-owners, by a notice issued in advance, where automatic contact mines will be laid. This notice must be communicated at once to the Government through the diplomatic channel."

Institute (1911), p. 167.

"ARTICLE 8. At the close of the war the * * * neutral States shall do their utmost to remove the mines which they have laid, each power removing its own mines. * * *

"The * * * neutral States whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete."

Institute (1911), p. 168.

"It is highly desirable that neutrals should be forbidden to block with mines the straits under their control which are passages between open seas. But should the prohibition apply to all neutral waters? The Convention of 1907 answers the question in the negative, stipulating only for the precautions imposed on belligerents and for previous notice to mariners of the places where the mines have been laid. It would be much simpler to declare them illegal in every case. The smaller states regard them as a cheap defence against possible aggression from a strong and unscrupulous belligerent. But their safety and independence really rest on moral considerations, and not on force. Against casual violations of their neutrality by subordinate commanders, torpedoes and submarines would be a more efficient protection than mines, and not vastly more expensive when the cost of possible compensations comes to be reckoned. Neutrals would lose little or nothing in the way of material security if they were denied the right to use mechanical mines in their ports and waters, while the cause of humanity, which is a direct interest of all states, would gain much."

Lawrence, p. 538.

"In order to defend themselves against possible violations of their neutral territory, neutrals may lay automatic contact mines off their coasts. If they do this, they must" observe the same precautions and make the same notifications that are incumbent on belligerents.

"Convention VIII. is quite as unsatisfactory in its rules concerning mines laid by neutrals as in its rules concerning mines laid by belligerents, and the danger to neutral shipping created by mines laid by neutrals is very great, all the more as the laying of mines by neutrals is not restricted to their maritime belt." For this article "speaks of the laying of contact mines on the part of neutral Powers off their coasts, without limiting the laying within the three-mile wide maritime belt as was proposed at the Second Peace Conference, and as article 6 of the *Reglementation internationale de l'Usage des Mines sous-marines et torpilles* of the Institute of International Law likewise proposes."

Oppenheim, vol. 2, 445.

Article 4, Hague Convention VIII, 1907, recognizes "the right of neutral powers to use submarine mines for the purpose of defending their neutrality. It is a right that comes within that of self-preservation, which has naturally included heretofore the right to use force by other means and on the surface to maintain the neutrality of their territory and the control of their waters."

Stockton, Amer. Journal International Law, vol. 2, p. 283.

Article 4, Hague VIII, 1907, substantially appears as Art. 68 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.— *Article 5, Hague VIII, 1907.*

"ARTICLE 8. At the close of the war the belligerent * * * States shall do their utmost to remove the mines which they have laid, each power removing its own mines.

"As regards anchored automatic contact mines laid by one of the belligerents off the coasts of the other, their position shall be notified to the other party by the State which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

"The belligerent * * * States whose duty it is to remove the mines after the war must make known the date at which the removal of the mines is complete."

Institute (1911), p. 168.

"ARTICLE 24. At the close of the war, the belligerent States shall do their utmost to remove the mines that they have laid, each one of his own.

"As regards the anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the State that has laid them, and each State must proceed, with the least possible delay, to remove the mines in its own waters.

"Belligerent States upon whom rests the obligation of removing these mines after the war is over shall, with as little delay as possible, make known the fact that, so far as is possible, the mines have been removed."

Institute (1913), p. 179.

Article 5, Hague VIII, 1907, substantially appears as Art. 69 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

EXISTING MINES TO BE MADE TO CONFORM TO PATTERN CONTEMPLATED BY HAGUE CONVENTION VIII, 1907.

The contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the matériel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.—*Article 6, Hague VIII, 1907.*

Article 6, Hague VIII, 1907, contains the "worst of all" the "loopholes" of the Convention as permission is "granted inferentially to backward or careless powers to continue to use mines that are incapable of becoming harmless as soon as they get loose from their moorings or after they have been immersed for an hour. All the Convention provides is that such instruments of death shall be made to satisfy the prescribed conditions 'as soon as possible.' This may mean in some cases indefinite delay."

Lawrence, p. 535.

The prohibition contained in Hague VIII, Article 1, "is watered down by the provision" of article 6.

Westlake, vol. 2, p. 314.

Article 6, Hague VIII, 1907, "has been criticised because it is not sufficiently definite and limited in the period providing for the transformation of mines in conformity with the rules laid down in articles 1 and 3. It seems to border upon the hypercritical to complain of this, for with varying budgets and technical skill and resources it appeared to be almost impossible to bind the nations to a fixed time. The governing principle being agreed upon, it is not very likely to be ignored and mines of the old pattern used if there is sufficient interval allowed before the next naval war."

Stockton, vol. 2, American Journal International Law, p. 284.

Article 6, Hague VIII, 1907, substantially appears as Art. 70 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

BOMBARDMENT OF UNDEFENDED PLACES AND BUILDINGS FORBIDDEN—NO EXCEPTION BECAUSE MINES ANCHORED OFF HARBOR.

The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor.—*Article 1, Hague IX, 1907.*

"ARTICLE 1. There is no difference between the rules of the law of war regarding bombardment by military land forces and by naval forces."

Institute (1896), p. 132.

"ARTICLE 2. Consequently the general principles laid down in Article 32 of the *Manual of the Institute* are applicable to the latter; that is to say, that it is forbidden: (*a.*) to destroy public or private property if this destruction is not demanded by the imperative necessity of war; (*b*) to attack and to bombard places that are not defended."

Institute (1896), p. 132.

"ARTICLE 3. The rules laid down in Articles 33 and 34 of the *Manual* are equally applicable to naval bombardments."

Institute (1896), p. 132.

"ARTICLE 4. In virtue of the general principles above, the bombardment by a naval force of an open town, that is to say, one which is not defended by fortificatilons or by other means of attack or of resistance for immediate defense, or by detached forts situated nearby, for example, at a maximum distance of from four to ten kilometers, is inadmissible except in the following cases:

"1. For the purpose of obtaining by requisitions or contributions what is necessary for the fleet. * * *

2. For the purpose of destroying dockyards, military establishments, depots of war munitions, or war vessels in a port.

Further, an open town which defends itself against the entrance of troops or of marines that have been landed may be bombarded for the purpose of covering the disembarkation of the soldiers and the marines, if the open town attempts to prevent it and, as an auxiliary measure of war, to facilitate the assault made by the troops and marines that have been landed, if the town defends itself. * * *

Institute (1896), p. 132.

"ARTICLE 5. An open town can not be exposed to a bombardment for the mere reason:

"1. That it is the capital of a State or the seat of the Government (but naturally these circumstances do not guarantee it in any way against a bombardment).

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"2. That it is at the time occupied by troops, or that it is ordinarily the garrison of troops of different arms intended to join the army in time of war."

Institute (1896), p. 133.

"ARTICLE 25. *Bombardment.*—The bombardment of undefended ports, towns, villages, dwellings, or buildings is forbidden.

"A place cannot be bombarded solely because submarine automatic contact mines are anchored off its coast."

Institute (1913), p. 179.

"More modern usage in sieges and storms, though in some respects very harsh, shows an advance in humanity. There is a distinction to be made between *forts* or *fortified towns* and undefended places. Any means of assailing a fort may be used which are likely to be successful, [but the bombardment of open undefended towns is now unlawful. There was a common agreement upon this point at the two Brussels conferences, and it is embodied in the Oxford Code of the Institute, thus being usage if not law. A hostile fleet, thferefore, would be prohibited from the destruction of the undefended seaports along our Atlantic coast."

Woolsey, p. 223.

"For a long time it was lawful to descend upon coasts, bombard towns, levy contributions, and burn places which refused to pay them. Even in 1813, the British admiral, Cochrane, had orders to destroy property on the American coast, but the injury done to Newark, in Canada, by our forces, was given as the reason. More recent operations have shown a milder spirit. Odessa was not attacked in the Russian war of 1853–1855, as being merely a commercial port. On the whole, there are signs that ravages by forces on both elements and requisitions on the ground of exemptions from them are growing obsolete."

Woolsey, p. 225.

Hall at p. 556, Note 2, refers to the bombardment of the commercial port of Valparaiso, Chile, by the Spanish fleet on March 31, 1866, "as a simple act of devastation" and says that "the act gave rise to universal indignation at the time, and has never been defended."

By the first paragraph of article 1, Hague IX, 1907, "one of the pet projects of a certain school of naval officers, both in England and on the Continent of Europe, was ruled out of the warfare of civilized men. No one can doubt now that it is not lawful to bombard rich and undefended coast towns if they refuse to pay ransom. After much controversy this humane principle has at length received the consecration of general assent." * * *

"At the Hague Conference of 1899 no agreement was reached on the question of naval bombardments. The plenipotentiaries were obliged to rest content with the expression of a wish, inserted in their Final Act, that the matter should be 'referred to a subsequent Conference for consideration.' The points at issue were connected with various barbarous proposals to destroy the open and undefended coast towns of the enemy by bombardment from the sea, or extract enormous ransoms by the threat of it. In 1896 the Institute of In-

ternational Law produced a series of excellent rules on the subject; and the United States Naval War Code of 1900 summarized in a single Article the cases in which a fleet might proceed to extremities. Thus guided, the second Hague Conference negotiated a Convention which reconciles in an admirable manner the claims of humanity and the necessities of warfare. It begins with a definite prohibition of the bombardment by naval forces of 'undefended ports, towns, villages, dwellings, or buildings.' But to this wholesome rule it permits two exceptions [Articles 2 and 3, H IX of 1907], irrespective of anything that might be done by way of reprisals for some gross breach of the laws of war on the part of the inhabitants. * * * No attempt was made in the Convention to define an undefended town; but it was stated that a town can not be regarded as defended, and therefore subject to bombardment, 'solely because automatic submarine mines are anchored off the harbor.' Great Britain, Germany, France, Japan, * * * made reservations against this regulation. Mines are not only a defence, but a defence that is dangerous to peaceful vessels as well as hostile squadrons. That the Conference actually encouraged the laying of them as if they were innocuous is a proof of its obsession by the subject. The rule it laid down cannot stand, with nearly all the great naval powers unbound by it. The first severe maritime struggle will demonstrate its futility."

Lawrence, pp. 446, 541–543.

"There is no doubt whatever that enemy coast towns which are defended may be bombarded by naval forces, acting either independently or in co-operation with a besieging army. But before the Second Peace Conference of 1907 the question was not settled as to whether or not *open and undefended* coast places might be bombarded by naval forces. * * * The First Peace Conference did not settle the matter, but expressed the desire 'that the proposal to settle the question of bombardment of ports, towns, and villages by a naval force may be referred to a subsequent Conference for consideration.' The Second Peace Conference * * * by Convention IX * * * has provided detailed rules concerning all the points in question. * * *

"The first case in which naval forces acted according to these rules occurred during the Turco-Italian war. On February 25, 1912, Admiral Faravelli, the commander of an Italian squadron, surprised, at dawn, the Turkish gunboat Awni-Illa and a torpedo-boat in the port of Beirut. These vessels were called upon to surrender, they were given until nine o'clock a. m. to comply with the demand, and the demand was communicated to the Governor and the Consular authorities. At nine o'clock the Turkish vessels were again, by signal, summoned to surrender, and as no reply was received, they were fired at and destroyed, but not without first having vigorously answered the fire of the Italians. Shells missing the vessels and bursting on the quay killed and wounded a number of individuals and damaged several buildings. The Turkish Government protested against this procedure as a violation of Convention IX. of the Second Peace Conference, but, provided the official report of Admiral Faravelli corresponds with the facts, the Turkish protest is unfounded.

Oppenheim, vol. 2, pp. 266, 268, 269.

Contra in Part.

"To define the term 'undefended,' article 1 expressly enacts that 'a place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour,' but Great Britain, France, Germany, and Japan entered a reservation against this, since they correctly consider such a place to be 'defended.'"

Oppenheim, vol. 2, p. 268.

Contra in Part.

With respect to reservations to the second paragraph of article 1, Hague IX, 1907, Westlake, vol. 2, p. 182, says: "Great Britain, France, Germany, and Japan have refused to accept the second paragraph. They are right. A place cannot be deemed undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open to the enemy to enter."

"The principle of H XXV [Annex II of 1899 and IV of 1907, Art. 25] is that a land force can occupy an undefended place and, if it must afterwards evacuate it, can destroy before doing so, all that its military value to the enemy exposes to lawful destruction; therefore bombarding the place without or before occupying it would be wantonly to endanger both the lives of the population and the property not lawfully subject to destruction. The same reason will apply to the dealings of a fleet with an undefended coast town, unless it cannot spare the force or the time required for landing and occupying it, including re-embarkation if necessary: in that case only can the question of its right to bombard it arise. Now suppose that in such a case the town contains government stores or factories, or important government offices from which orders relating to the war are issued. These are things exposed to lawful destruction, and cannot claim to be spared because in the circumstances they can be destroyed only by fire from the sea, but the enemy is bound to take care that he does no avoidable damage to life or to innocuous property. This is the justification of the bombardment of the large government stores at Odessa by the British during the Crimean War, and of the opinion which has been given by a large number of international lawyers of all countries that the government offices at the Hague, which is virtually a coast town, might be bombarded."

"But suppose that the undefended coast town contains no such public invitations to attack as have been under our consideration, but that it abounds in private wealth. This, as at Liverpool, may be of such nature and amount that its destruction would be a serious, but by no means a decisive, blow to the resources of the country available for continuing the war; or, as at Brighton, its loss might fall only on the luxury of a certain number of individuals. In either case the destruction is not imperatively demanded, and therefore as an act of land war would be prohibited by H XXIII (g) (Convention IV of 1907); and there can be no reason for passing a different judgment if the engine of destruction should be a fleet."

Westlake, Vol. 2, pp. 87, 88.

"It was not the town of Alexandria, which is open, but the forts outside it erected or strengthened by Arabi Pasha, that were bombarded by the British fleet in 1882."

Westlake, vol. 2, p. 88, note.

"The bold and categorical prohibition of Article I is weakened by the two following articles. Towns which are undefended can avoid bombardment if after due notice they carry out the destruction of the military works, etc., mentioned in Article 2, paragraph I, but 'military necessities' may not always allow of this notice being given, and then the towns where such military works, etc., exist will find themselves without any warning, and although 'undefended,' subjected to bombardment; not directly, it is true, for the guns of the attacking fleet will be turned on the military works, etc., but some parts of the town can not escape destruction.

"Undefended coast towns are still in many cases left to be dealt with as the 'necessities of war' require, but it can not be denied that it is a distinct gain to have obtained a definite agreement prohibiting the attack or bombardment by naval forces of undefended ports, towns, villages, habitations and buildings, and to have the prohibition made applicable in cases of nonpayment of a money contribution."

Higgins, p. 357.

Contra in Part.

"The meaning of the term 'undefended' engaged the attention of the committee but owing to the difficulty of distinguishing between the defence of a coast and of a town near the coast no definition was attempted. The second paragraph, however, treats as undefended towns, those before which automatic submarine contact mines are anchored. This paragraph was strongly opposed by Captain Ottley [British naval delegate] who was supported by the delegates of Germany, France, China, Japan and Spain. Mines, it was pointed out, being a general danger to navigation, and far more destructive than guns, it was illogical to render inviolable a town defended by mines and to refuse inviolability to one defended by guns. Moreover, if undefended towns are free from bombardment, what is the need of laying mines on the sea front? A belligerent who has undertaken not to bombard an undefended coast town is entitled to make use of the coast without expecting to run the danger of destruction on approaching it. This argument is sound and unanswerable. A town which has mines moored before its harbour has taken most effective steps to defend itself against occupation, and 'the price of immunity from bombardment is that the place shall be left open to the enemy to enter.'"

Higgins, p. 354.

"Such exceptional acts as the burning of Paita (Chile), or the bombardment of Valparaiso * * * will of course, occur from time to time. My position is that they are so far stigmatized as barbarous by public opinion that their perpetration in civilized warfare may be regarded as improbable; in other words, that they are forbidden by international law."

Holland, Studies in International Law, p. 101.

For an account of the "justifiable" bombardment of Greytown, Nicaragua, by an American naval vessel on July 13, 1852, and of Odessa, Russia, by the French naval forces on April 22, 1854, see Moore's International Law Digest, vol. 7, pp. 346–354. For bombardment of Valparaiso by the Spanish fleet on March 31, 1866, and of Pisagua, Chile, on June 8, 1891, during the revolutionary war in Chile, see id. vol. 7, pp. 354–360, 362.

"ART. 4. The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given."

United States Naval Code, 1900.

"163. You will strictly conform to the provisions of Convention IX of the Hague of October 18, 1907, concerning the bombardment by naval forces in time of war."

French Naval Regulations, 1912.

Article 1, Hague IX, 1907, substantially appears as Art. 75 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Military works, military or naval establishments, depots of arms or war matériel, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.—*Article 2, Hague IX, 1907.*

Art. 3 of the Institute (1896), p. 132, makes the following article of the Manual of the Laws of War "equally applicable to Naval bombardments:"

"33. The commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities."

Article 4 of the Institute (1896), p. 132, permitted the bombardment of open towns; * * *.

"2. For the purpose of destroying dockyards, military establishments, depots of war munitions, or war vessels in a port. * * *"

"ARTICLE 26. Military works, military or naval establishments, depots of arms or war *matériel*, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the warships in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

"He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

"If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible."

Institute (1913), p. 179.

"No objection can be taken to the bombardment of shipbuilding yards in which vessels of war or cruisers can be built. Of course, also, a belligerent is not responsible for devastation caused by, say, the accidental spreading of a fire to a town from vessels in harbour burnt because of their possible use as transports, or from burning naval or military stores."

Hall, p. 556, Note 3.

These military works, etc., the commander of the naval forces "may even bombard * * * without notice, doing as little damage as possible to the town, if the exigencies of war demand immediate action."

Lawrence, p. 542.

"Although undefended places themselves are exempt, nevertheless military works, military or naval establishments, depots of arms or war material, workshops or plant which could be utilised for the needs of the hostile fleet or army, and men-of-war in the harbour of undefended places may be bombarded. And no responsibility is incurred for any unavoidable damage caused thereby to the undefended place or its inhabitants. As a rule, however, the commander must, before resorting to bombardment of these works, ships, and the like, give warning to the local authorities so that they can destroy the works and vessels themselves. Only if, for military reasons, immediate action is necessary and no delay can be allowed to the enemy, may bombardment be resorted to without previous warning, the commander being compelled to take all due measures in order that the undefended place itself may suffer as little harm as possible."

Oppenheim, vol. 2, p. 269.

"The word 'installations' translated 'plant' in the first paragraph, was intended to include such as are not of exclusively warlike use, and in the report of the committee railways and floating docks were given as examples. But the word 'provisions,' which for example would include coal, was not admitted, since it was thought that the term 'material of war' gave sufficient satisfaction to military requirements. As an example of the military necessities mentioned in the last paragraph, it was pointed out that a naval commander must be allowed to open fire immediately on ships lying in a road, in order to prevent their joining an enemy fleet close at hand."

Westlake, vol. 2, p. 183.

In the draft of the proposed convention submitted by the British delegation to the Committee considering the H VIII of 1907, the following definition is made of a fortified military port:—"Only ports which possess at least one large graving-dock and are provided with the equipment necessary for the construction and repair of ships of

war, and in which a staff of workmen paid by the state to construct and repair ships of war is maintained in time of peace, shall be considered as coming within the meaning of the term 'ports de guerre.'"

Higgins, p. 330.

"Art. 4. The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given."

United States Naval Code, 1900.

Article 2, Hague IX, 1907, substantially appears as Art. 76 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.—*Article 3, Hague, IX, 1907.*

"Art. 56. Impositions in kind (requisitions), demanded from communes, or inhabitants, should be in proportion to the necessities of war as generally recognized and in proportion to the resources of the country. Requisitions can only be made on the authority of the commander in the locality occupied."

Institute (1880), p. 37.

"Article 58. The occupant can not collect extraordinary contributions of money, save as an equivalent for fines, or imposts not paid, or for payments not made in kind. Contributions in money can be imposed only on the order, and the responsibility of the general in chief, or of the superior civil authority established in the occupied territory, as far as possible, in accordance with the rules of assessment and incidence of the taxes in force."

Institute (1880), p. 37.

Bombardment of open towns is permitted:

"1. For the purpose of obtaining by requisitions or contributions what is necessary for the fleet.

"These requisitions or contributions must not exceed the limits prescribed by Articles 56 and 58 of the *Manual of the Institute.*"

Institute (1896), p. 132.

"Article 27. The bombardment of undefended ports, towns, villages, dwellings, or buildings because of * * * the refusal to comply with requisitions for provisions or supplies is forbidden."

Institute (1913), p. 180.

"Requisitions are forced supplies of food, fodder, horses, wagons, lodging, material, labor, railroad rolling-stock, and so on, under the plea of military necessity. They are made under the authority of

the commander of any detached force. Receipts are given for the property taken, but such receipts do not seem necessarily to involve payment for the said property; this is often made by the requisitioning force, or payment arranged for by the terms of peace, or assumed by the government of the owner. This is a question of policy. Requisitions were made in many cases during the Franco-German war of 1870. Now if the true principle is that war is a public contest, waged between the powers or authorities of two countries, the passive individual ought not to suffer more than the necessities of war require. Vattel says, 'that a general who would not sully his reputation, is to moderate his contributions. An excess in this point is not without the reproach of cruelty and inhumanity.' But many generals will go to the extreme of what they think can be exacted, without regard to their reputation; and cruelty and inhumanity are as unavoidable in such transactions, as they would be if sheriffs and their men were to levy on goods by force of arms, and pay themselves out of the things seized. Moreover, requisitions are demoralizing, and defeat their own ends. They foster the lust of conquest, they arouse the avarice of officers, they leave a sting in the memories of oppressed nations; who, when iniquity is full, league together to destroy the great plunderers of mankind. The only true and humane principle is that already laid down, that war is waged by state against state, by soldier against soldier. The state resists an effort to obtain justice; the soldier obstructs the way of the armed officer of justice, and must be resisted."

Woolsey, pp. 220, 221.

"The great increase which has taken place in several countries in the number of rich undefended coast towns, the larger facilities for making descents upon them which are afforded by the use of steam, and, finally, certain recent indications that the levy of money under threat of attack may be used as a means of offence in the next naval war, render it necessary to consider whether the exaction of requisitions is a permissible incident, and the levy of contributions a permissible form, of hostilities conducted by a naval force.

"In 1882 Admiral Aube, in an article[1] on naval warfare of the future, expressed his opinion that 'armoured fleets in possession of the sea will turn their powers of attack and destruction against the coast towns of the enemy, irrespectively of whether these are fortified or not, or whether they are commercial or military, and will burn them and lay them in ruins, or at the very least will hold them mercilessly to ransom;' and he pointed out that to adopt this course would be the true policy of France, in the event of a war with England. There is no reason to believe that either political or naval opinion in France dissented from these views; very shortly after their publication Admiral Aube was appointed Minister of Marine; and he was allowed to change the shipbuilding programme of the country, and to furnish it with precisely the class of ships needed to carry them out. During the English Naval Manoeuvres of 1888, an attempt was made to bring home to the inhabitants of commercial ports what the consequences of deficient maritime protection might be, by inflicting imaginary bombardments and levying imaginary

[1] Revue des Deux Mondes, vol. 50, p. 331.

contributions upon various places along the coast. Mr. Holland objected to these proceedings on the ground that they might be cited by an enemy as giving an implied sanction to analogous action on his part. A correspondence followed, in which several naval officers of authority combated Mr. Holland's objections, partly on the ground that, in view of foreign naval opinion on the subject, an enemy must be expected to attack undefended English towns, partly on the ground that attack upon them would be a legitimate operation of war. Still more significant is the fact, which has become known, that in 1878 it was intended by the Russian government that the fleet at Vladivostock should sail for the undefended Australian ports and lay them under contribution immediately on the outbreak of hostilities.

"Two questions are suggested by the above indications of opinion and of probable action on the part of naval powers. First, the restricted one, whether contributions and requisitions can legitimately be levied by a naval force under threat of bombardment, without occupation being effected by a force of debarkation; and, secondly, the far larger one, whether the bombardment and devastation of undefended towns, and the accompanying slaughter of unarmed populations, is a proper means of carrying on war. The latter question will find its answer elsewhere.

"Requisitions may be quickly disposed of. They are not likely to be made except under conditions in which a demand for the articles requisitioned would be open to little, if any, objection. A vessel of war or a squadron cannot be sent to sea in an efficient state without having on board a plentiful supply of stores identical with, or analogous to, those which form the usual and proper subjects of requisition by a military force. It is only in exceptional and unforseen circumstances that a naval force can find itself in need of food or of clothing; when it is in want of these, or of coal, or of other articles of necessity, it can unquestionably demand to be supplied wherever it is in a position to seize; it would not be tempted to make the requisition except in case of real need; and generally the time required for the collection and delivery of large quantities of bulky articles, and the mode in which delivery would be effected, must be such that if the operation were completed without being interrupted, sufficient evidence would be given that the requisitioning force was practically in possession of the place. In such circumstances it would be almost pedantry to deny a right of facilitating the enforcement of the requisition by bombardment or other means of intimidation.

"Contributions stand upon a different footing. They do not find their justification in the necessity of maintaining a force in an efficient state; they must show it either in their intrinsic reasonableness, or in the identity of the conditions, under which they would be levied, with those which exist when contributions are levied during war upon land. Such identity does not exist. In the case of hostilities upon land a belligerent is in military occupation of the place subjected to contribution; he is in it, and remains in it long enough to deprive the inhabitants of the equivalent of the contribution demanded, by plundering the town, or by seizing and carrying off the money and the valuables which he finds within it; he accepts a composition for property which his hand already grasps. This is a totally different

matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which he is not, which he probably dare not enter, which he cannot hold even temporarily, and where consequently he is unable to seize and carry away. Ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions; because they render needless the use of violent means of enforcement. If devastation and the slaughter of non-combatants had formed the sanction under which contributions are exacted, contributions would long since have disappeared from warfare upon land. It is not to be denied that contributions may be rightly levied by a maritime force; but in order to be rightly levied, they must be levied under conditions identical with those under which they are levied by a military force. An undefended town may fairly be summoned by a vessel or a squadron to pay a contribution; if it refuses a force must be landed; if it still refuses like measures may be taken with those which are taken by armies in the field. The enemy must run his chance of being interrupted, precisely as he runs his chance when he endeavours to levy contributions by means of flying columns. A levy of money made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right."

Hall, pp. 449–452.

Requisitions on a town "are restricted to 'provisions or supplies necessary for the immediate use of the naval force before the place,' and they must be proportioned to its resources. Money payment should be made for them, or receipts given. Demands for them are to be made only in the name of the commander of the naval force; but if they are refused, the place itself may be bombarded."

Lawrence, p. 542.

"Undefended ports, towns, villages, dwellings, or other buildings may be bombarded by a naval force, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies *necessary* for the *immediate* use of the naval force concerned. These requisitions must be proportional to the resources of the place; they can only be demanded by the commander of the naval force concerned; they must be paid for in cash, and, if this is not possible for want of sufficient ready money, their receipt must be acknowledged."

Oppenheim, vol. 2, p. 265.

Article 3, Hague IX, 1907, "is even more strict than" the similar one in the Hague Convention on land warfare, for which Hague Annex of II of 1899 and IV of 1907, Art. 52 "allows requisitions for supplying the necessities of the army of occupation, of which only a small part may be in or near the place subjected to the requisitions, the naval article allows them only for those of the force before the locality."

Westlake, vol. 2, p. 184.

"ART. 4. The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except * * *, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given."

United States Naval Code, 1900.

Article 3, Hague IX, 1907, substantially appears as Art. 77 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.—*Article 4, Hague IX, 1907.*

"ARTICLE 4. * * * Bombardments of which the object is only to exact a ransom are specially forbidden, and, *a fortiore*, those which are intended only to bring about the submission of the country by the destruction, without other reason, of the peaceful inhabitants or their property."

Institute (1896), p. 132.

"ARTICLE 27. The bombardment of undefended ports, towns, villages, dwellings, or buildings because of the non-payment of contributions of money * * * is forbidden."

Institute (1913), p. 180.

Definition of Contributions.

"Contributions are forced payments of money, exacted from a conquered territory, over and above the taxes used for its own government. They can be levied only by officials of the highest authority. They are a relic of the ancient right of a conqueror to the private property of the conquered. The Prussians in Austria, 1866, and the Germans in France, 1870, made use of contributions."

Woolsey, p. 220.

Definition of Contributions.

"Contributions are such payments in money as exceed the produce of the taxes, which * * * are appropriated as public property. * * * The amount * * * is fixed at the will of the invader * * * and * * * can be levied only by the commander-in-chief, or by the general of a corps acting independently."

Hall, pp. 443–444.

Article 4, Hague IX, 1907, "expressly forbids bombardment of undefended coast towns for the non-payment of money contributions, or, in other words, ransom. An end is thus put, let us hope forever, to the outrageous idea that modern laws of war allow the fleets of civilized powers to roam up and down the territorial waters of their enemies, spreading death and destruction inland as far as their guns will carry."

Lawrence, p. 542.

"No case has to my knowledge occurred in Europe of requisitions or contributions imposed by naval forces upon enemy coast towns. The question whether or not such requisitions and contributions

would be lawful became of interest through an article on naval warfare of the future, published in 1882 by the French Admiral Aube in the *Revue des Deux Mondes* (vol. 50, p 331). Aube pointed out that one of the tasks of the fleet in sea warfare of the future would be to attack and destroy by bombardment fortified and unfortified military and commercial enemy coast towns, or at least to compel them mercilessly to requisitions and contributions. As during the British naval manoeuvres of 1888 and 1889 imaginary contributions were imposed upon several coast towns, Hall took into consideration the question under what conditions requisitions and contributions would be lawful in sea warfare. He concluded, after careful consideration and starting from the principles regarding requisitions and contributions in land warfare, that such requisitions and contributions may be levied, provided a force is landed which actually takes possession of the respective coast town and establishes itself there, although only temporarily, until the imposed requisitions and contributions have been complied with; that, however, no requisitions or contributions could be demanded by a single message sent on shore under threatened penalty of bombardment in case of refusal. There is no doubt that Hall's arguments are, logically, correct; but it was not at all certain that the naval Powers would adopt them, since neither the Institute of International Law nor the U. S. Naval War Code had done so. The Second Hague Peace Conference has now settled the matter through the Convention (IX.) concerning bombardment by naval forces in time of war."

Oppenheim, vol. 2, pp. 264–265.

While article 4, Hague IX, 1907, "does not directly forbid" contributions, it "expressly forbids bombardment of undefended places by a naval force on account of non-payment of money contributions; in practice, therefore, the demand for contributions will not occur in naval warfare."

Oppenheim, vol. 2, pp, 265, 266.

Article 4, Hague IX, 1907, differs from the provisions of H, Annex II of 1899 and IV of 1907, Article 49, allowing contributions in land warfare. "And with reason, because the naval force has no other market at hand in which to supply itself with what the locality cannot furnish in kind, and the money, unexpended, would not relieve its necessities."

Westlake, vol. 2, p. 184.

The term *ransom* was not used for the reason that "the Committee preferred to suppress the word, as to forbid it in this connection might have led to the inference that the demand of a ransom was not prohibited in principle."

Higgins, p. 356.

"The naval historian, Mr. Younge, in commenting on the burning of Paita, in Chile, as far back as 1871, for non-compliance with a demand for a money contribution (ultimately reduced to a requisition of provisions for the ships), speaks of it as 'worthy only of the most lawless pirate or buccaneer * * * as a singular proof

of how completely the principles of civilized warfare were conceived to be confined to Europe.'"

Holland, Studies International Law, p. 101.

"ART. 4. * * * The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden."

United States Naval Code, 1900.

Article 4, Hague IX, 1907, substantially appears as Art. 78 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

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In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.—*Article 5, Hague IX, 1907.*

Article 3 of the Institute (1896), p. 132, makes the following article of the Institute's Manual of the Laws of War "equally applicable to naval bombardments":

"34. In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes, hospitals and places where the sick and wounded are gathered, on the condition that they are not being utilized at the time, directly or indirectly, for defense.

"It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand."

"ARTICLE 28. In bombardments all useless destruction is forbidden, and especially should all necessary measures be taken by the commander of the attacking force to spare, as far as possible, sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on condition that they are not used at the same time for military purposes.

"It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

Institute (1913), p. 180.

"The bombardment of a town in the course of a siege * * * when in strict necessity operations need only be directed against the works, and when therefore bombardment really amounts to an attempt to obtain an earlier surrender than would be militarily necessary, through the pressure of misery inflicted on the inhabitants, is an act which, though permissible by custom, is a glaring violation of the principle by which custom professes to be governed." * * *

This "measure is one of peculiar cruelty, and is not only unnecessary but more often than not is unsuccessful. It cannot be excused; and can only be accounted for as a survival from the practices which were formerly regarded as permissible and which to a certain extent lasted, as has been seen, till the beginning of the present century. For the present however it is sanctioned by usage; and it was largely resorted to during the Franco-German war of 1870."

Hall, pp. 413, 556.

Article 5, Hague IX, 1907, substantially appears as Art. 79 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.—*Article 6, Hague IX, 1907.*

The form of this article "is due to Captain Ottley's [British naval delegate] representation, in which he received the support of the Japanese delegate (M. Tsudzuki). The original draft laid down that previous warning of a bombardment should be given to the authorities, but Captain Ottley pointed out that it was frequently of the greatest importance to attack and destroy as speedily as possible a fortress or arsenal of the enemy or warships in port. Notice would in many cases be fatal to the success of an attack. A fleet, for instance, arrives before a fortress or naval port without having been observed by the enemy; to give warning of the bombardment would nullify the effect of the manoeuvre. Under the Article as it now stands, the commander of the attacking force must, *except where military exigencies do not permit it*, do his utmost to warn the authorities before commencing the bombardment. This exception brings the Article into harmony with the corresponding Article in 4 Hague Convention 1907, Regulations (Art. 26)."

Higgins, p. 356. See also to same effect, Westlake, vol. 2, p. 184.

"Article 29. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities."

Institute (1913), p. 180.

Article 6, Hague IX, 1907, substantially appears as Art. 80 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

A town or place, even when taken by storm, may not be pillaged.—*Article 7, Hague IX, 1907.*

"Article 18. Pillage and devastation are forbidden.

"It is forbidden to destroy enemy property, except in the cases where such destruction is imperatively required by the necessities of war or authorized by provisions of the present regulations."

Institute (1913), p. 178.

"The former custom of pillage was the most brutal among the recognized usages of war. The suffering which directly attended it was out of all proportion to the advantages gained by the belligerent applying it; and it opened the way to acts which shocked every feeling of humanity. * * * As the contributions and requisitions which are the equivalents of compositions for pillage are generally levied through the authorities who represent the population, their incidence can be regulated; they are moreover unaccompanied by the capricious cruelty of a bombardment, or the ruin which marks a field of battle. If therefore they are compared, not merely with universal pillage, but with more than one of the necessary practices of war, they will be seen to be relatively merciful." The gradual abandonment of the practice of pillage was due "partly" to "an increase of humane feeling, partly" to "the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found, when war became systematic, that their own operations were embarrassed in countries of which the resources were destroyed."

Hall, pp. 442, 441.

Pirates.

"A naval commander, charged with the duty of destroying a nest of pirates, would not scruple to shell them out of their stronghold and then land a party to burn it."

Lawrence, p. 549.

Meaning of "Pillage."

"Pillage, as an untechnical term, means indiscriminate plundering, such as under the old rule of *courir sus* was habitually practised against the enemy. As a term of modern law it may be defined as the unauthorised taking away of property, public or private. * * * It will be pillage if even what may be taken is taken in a way not authorised by the military authority, or if the individual captor appropriates to himself what by the regulations of his state or army he ought to give account of.

"The abolition of the old indiscriminate plundering is one of the greatest advances towards humanity that have been realised in the practice of war."

Westlake, vol. 2, p. 103.

This conforms to H II of 1899, Art. 28, and IV of 1907, Art. 28, while "the transposition of the word 'even' emphasises the prohibition against pillage contained in" article 28.

Higgins, p. 357.

"ART. 3. Military necessity * * * does not permit wanton devastation, the use of poison, or the doing of any hostile act that would make the return of peace unnecessarily difficult.

"Noncombatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such noncombatants will permit."

United States Naval Code, 1900.

Article 7, Hague IX, 1907, substantially appears as Art. 81 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Privateering is, and remains abolished.—*Article 1, Declaration of Paris, 1856.*

"ART. XVI. * * * Every individual who is desirous of fitting out a privateer, shall, before he receives letters-patent, or special commission, be obliged to give bond with sufficient sureties, before a competent judge, for a sufficient sum, to answer all damages and wrongs which the owner of the privateer, his officers, or others in his employ may commit during the cruise, contrary to the tenor of this treaty, and contrary to the edicts published by either party, whether by the King of Sweden or by the United States, in virtue of this same treaty, and also under the penalty of having the said letters-patent and special commission revoked and made void."

Treaty between United States and Sweden, 1783. Treaties, &c., of United States, Malloy, vol. 2, p. 1730. (This treaty terminated 1798, but Article 16, together with certain other articles, was revived by treaties of 1816 and 1827 with Sweden and Norway.)

"ART. XXIII. No subject of the King of Sweden shall take a commission or letters of marque for arming any vessel to act as a privateer against the United States of America, or any of them, or against the subjects, people, or inhabitants of the said United States, or any of them, or against the property of the inhabitants of the said States, from any Prince or State whatever, with whom the said United States shall be at war. Nor shall any citizen, subject, or inhabitant of the said United States, or any of them, apply for or take any commission or letters of marque for arming any vessel to cruize against the subjects of his Swedish Majesty, or any of them, or their property, from any Prince or State whatever with whom his said Majesty shall be at war. And if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate."

Treaty between United States and Sweden, 1783. Treaties, &c., of United States, Malloy, vol. 2, p. 1733. (This treaty terminated 1798, but Article 23, together with certain other articles, was revived by treaties of 1816 and of 1827, with Sweden and Norway.)

"ART. XX. No citizen or subject of either of the contracting parties shall take from any Power with which the other may be at war any commission or letter of marque, for arming any vessel to act as a privateer against the other, on pain of being punished as a pirate; nor shall either party hire, lend, or give any part of its naval or military force to the enemy of the other, to aid them offensively or defensively against the other."

Treaty between United States and Prussia, 1799. Treaties, &c., of United States, Malloy, vol. 2, p. 1493. (This treaty expired June 22, 1810, but Article 20 thereof, together with certain other articles, was revived by Article 12 of the treaty of 1828.)

"ART. XXVI. Whenever one of the contracting parties shall be engaged in war with another State, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said parties so at war, under the pain of being treated as a pirate."

Treaty between United States and Columbia, 1846. Treaties, &c.. of United States, Malloy, vol. 1, p. 310.

"ART. XXV. No citizen of the Republic of Bolivia shall take any commission or letters of marque for arming any ship or ships to act as privateers against the said United States, or any of them, or against the citizens, people or inhabitants of the said United States, or any of them, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war; nor shall any citizen or inhabitant of the United States, or any of them, take any commission or letters of marque for arming any ship or ships to act as privateers against the citizens of the Republic of Bolivia, or any of them, or the property of any of them, from any Prince or State with which the said Republic of Bolivia shall be at war; and if any person of either nation shall take such commissions or letters of marque he shall be punished according to their respective laws."

Treaty of 1858, United States and Bolivia. Treaties, &c., of United States, Malloy, vol. 1, p. 121.

"4. Privateering is forbidden."

Institute (1877), p. 15.

"Article 1. The war vessels and military forces of belligerent States are alone authorized to exercise the law of prize, that is to say, the stopping, visit, search and seizure of merchant vessels during a naval war."

"Article 2. Privateering is forbidden."

"Article 3. The arming of privateers is still permitted as a method of reprisal against belligerents which do not respect the principle contained in Article 2. In this case it is forbidden to give commissions to foreigners."

Institute (1882), p. 46.

"ARTICLE 12. *Privateering, private vessels, public vessels not warships.* Privateering is forbidden.

"Apart from the conditions laid down in Articles 3[1] and following neither public nor private vessels, nor their personnel, may commit acts of hostility against the enemy.

"Both may, however, use force to defend themselves against the attack of an enemy vessel."

Institute (1913), p. 177.

"It is now the practice of maritime states to make use of the voluntary aid of individuals against their enemies as auxiliary to the public force; and Bynkershoek says that the Dutch formerly employed no vessels of war but such as were owned by private persons, and to

[1] See Institute, p. 176.

whom the government allowed a proportion of the captured property, as well as indemnity from the public treasury. Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruise against the commerce of the enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission. Sir Matthew Hale held it to be depredation in a subject to attack the enemy's vessels, except in his own defence, without a commission. The subject has been repeatedly discussed in the Supreme Court of the United States, and the doctrine of the law of nations is considered to be that private citizens cannot acquire a title to hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own defence. If they depredate upon the enemy without a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy is not warranted to consider them as criminals, and, as respects the enemy, they violate no rights by capture.

"Such hostilities, without a commission, are, however, contrary to usage, and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy unless committed in time of peace. Vattel, indeed, says, that private ships of war, without a regular commission, are not entitled to be treated like captures made in a formal war. The observation is rather loose, and the weight of authority undoubtedly is, that non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed, by the law of nations, pirates. They are lawful combatants, but they have no interest in the prizes they may take, and the property will remain subject to condemnation in favor of the government of the captor, as *droits of the admiralty*. It is said, however, that in the United States the property is not strictly and technically condemned upon that principle, but *jure reipublicae;* and it is the settled law of the United States, that all captures made by non-commissioned captors are made for the government.

"In order to encourage privateering, it is usual to allow the owners of private armed vessels to appropriate to themselves the property, or a large portion of the property, they may capture; and to afford them and the crews other facilities and rewards for honorable and successful efforts. This depends upon the municipal regulations of each particular power; and, as a necessary precaution against abuse, the owners of privateers are required, by the ordinances of the commercial states, to give adequate security that they will conduct the cruise according to the laws and usages of war and the instructions of the government, and that they will regard the rights of neutrals, and bring their prizes in for adjudication. These checks are essential to the character and safety of maritime nations. Privateering, under all the restrictions which have been adopted, is very liable to abuse. The object is, not fame or chivalric warfare, but plunder and profit. The discipline of the crews is not apt to be of the highest order, and privateers are often guilty of enormous excesses, and become the scourge of neutral commerce. They are sometimes manned and officered by foreigners, having no permanent connection with the country, or interest in its cause. This was a complaint made by the United States, in 1819, in relation to irregularities and acts of atrocity committed by private armed vessels sailing under the flag of Buenos

Ayres. Under the best regulations, the business tends strongly to blunt the sense of private right, and to nourish a lawless and fierce spirit of rapacity. Efforts have been made, from time to time, to abolish the practice. In the treaty of amity and commerce between Prussia and the United States, in 1785, it was stipulated, that in case of war, neither party should grant commissions to any private armed vessels to attack the commerce of the other. But the spirit and policy of maritime warfare will not permit such generous provisions to prevail. That provision was not renewed with the renewal of the treaty. A similar attempt to put an end to the practice was made in the agreement between Sweden and Holland, in 1675, but the agreement was not performed. The French legislature, soon after the breaking out of the war with Austria, in 1792, passed a decree for the total suppression of privateering; but that was a transitory act, and it was soon swept away in the tempest of the revolution. The efforts to stop the practice have been very feeble and fruitless, notwithstanding that enlightened and enlarged considerations of national policy have shown it to be for the general benefit of mankind to surrender the licentious practice, and to obstruct as little as possible the freedom and security of commercial intercourse among the nations."
* * *

"Vattel admits, that an individual may, with a safe conscience, serve his country by fitting out privateers; but he holds it to be inexcusable and base to take a commission from a foreign prince to prey upon the subjects of a state in amity with his native country. The laws of the United States have made ample provision on this subject, and they may be considered as in affirmance of the law of nations, and as prescribing specific punishment for acts which were before unlawful. An act of Congress prohibits citizens to accept, within the jurisdiction of the United States, a commission, or for any person not transiently within the United States, to consent to be retained or enlisted, to serve a foreign state in war, against a government in amity with us. It likewise prohibits American citiens from being concerned, without the limits of the United States, in fitting out, or otherwise assisting, any private vessel of war, to cruise against the subjects of friendly powers. Similar prohibitions are contained in the laws of other countries; and the French Ordinance of the Marine of 1681 treated such acts as piratical. The better opinion is, that a cruiser, furnished with commissions from two different powers, is liable to be treated as a pirate; for, though the two powers may be allies, yet one of them may be in amity with a state with whom the other is at war. In the various treaties between the powers of Europe in the two last centuries, and in the several treaties between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Colombia, Chili, etc., it is declared, that no subject or citizen of either nation shall accept a commission or letter of marque, to assist an enemy in hostilities against the other, under pain of being treated as a pirate."

Kent, vol. 1, pp. 105–110.

"Spain and Mexico adopted the last three" articles of the Declaration of Paris, "as their own, but, on account of the first article, declined acceding to the entire declaration. The United States adopted the second, third and fourth propositions, independently of the first,

offering, however, to adopt that also, with the following amendment, or additional clause: '*And the private property of the subjects, or citizens of a belligerent on the high seas, shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.* * * * There is reason to hope that all the maritime nations of Europe will eventually adopt the extension. But if they should not, the United States will stand almost alone in their adhesion to, and advocacy of, privateering—a practice condemned by their earliest statesmen and best writers on public law, and now abandoned by its former advocates and supporters in Europe. The abstract *right*, under the law of nations, to use privateers, cannot be questioned; and it must also be observed that the advantage to be derived from the use of private armed vessels, in case of war, would be much greater to the United States than to any European power; moreover, that these European states, now most active in advocating the abolition of privateering, were its strongest supporters when it was most conducive to their own power. Unfortunately, nations, like individuals, are more influenced by immediate self-interest, than by the progress of civilization, the ultimate peace of the world, and the happiness of the human race."

Halleck, p. 395.

Following the Crimean War in which none of the belligerents issued letters of marque, privateering was formally abolished by the Article 1 of the Declaration of Paris. To this declaration the United States did not adhere.

The history of the relation of the United States to this declaration may be thus summarized: "When asked to give in our adhesion to the four articles, the reply was that we were not willing to debar ourselves from the right to use privateers in any possible exigency of war, as our policy was to have a small navy, and we always had a large and very much exposed commerce; but that we would agree to the articles, if all private property at sea should be held exempt from capture. This, known as the 'American Amendment,' or 'Marcy Amendment,' was well received by the other parties to the Articles of Paris, but was prevented from being adopted by the opposition of England. Subsequently, the United States withdrew its proposal; seemingly unwilling to renounce the right to use privateers, even on the terms of exemption of all private property. At the outset of our civil war, the United States proposed conventions adopting the Articles of Paris as they stood, without waiting for the recognition of the exemption of all private property. This failed, because Great Britain and France insisted upon the addition of an explanatory clause, intended to meet their own possible relations with the vessels of war or privateers of the rebel Confederacy, to which the United States government would not agree."

Wheaton, Dana's Note 223, p. 608.

"The first unequivocal effort to break up privateering by a permanent treaty stipulation, was that by Dr. Franklin, in the celebrated twenty-third article in the treaty with Prussia of 1785, in which the two contracting powers agree to grant no commissions to private armed vessels. The National Assembly of France, by a decree in 1792, requested the executive authorities to enter into treaties to

suppress privateering; but this had no result in the action of any large maritime power. (Ortolan, tom. ii. p. 51.) The United States Government, in 1823, sent instructions to its ministers in Great Britain, France, and Russia to propose treaties for abstaining from the use of privateers; but no such treaties were effected. (Annual Register, 1823, p. 185.) In the war between France and Spain, in 1823, the two belligerents set out with declarations against the commissioning of privateers and the capture of private property at sea; but it is supposed that the declarations, at least on the latter point, were not strictly adhered to. The result of the correspondence of the American ministers with the governments of France, England, and Russia, from 1823 to 1830, showed that those powers were not willing to enter into separate agreements with one nation to disuse privateering, while expressing a desire to see a general agreement of the chief maritime powers to that effect. (See instructions of Mr. J. Q. Adams, in 1823; and the correspondence between Mr. Rush and Messrs. Huskisson and Canning, Mr. Sheldon and M. Chateaubriand, and Mr. Middleton and Count Nesselrode, in 1823–4.) But, in all these negotiations, the question of privateering was complicated with the proposal to abandon capture of all private property at sea.

"Afterwards, the United States Government ceased from its efforts to secure these objects, mainly from a change of policy. It was thought that the United States, with its small navy, might be obliged to avail itself of privateers against the formidable navies of the great European powers. (Mr. Buchanan to Count Nesselrode, 18th May, 1832, and Mr. Van Buren's instructions to Mr. Randolph, June 18, 1830.)"

Wheaton, Dana's Note 173, p. 453.

"In the Mexican war, the United States issued no letters of marque. Mexico issued them; but they were not taken up by foreigners, on account of the repressive legislation and treaties of foreign powers. England, France, and other neutrals, especially prohibited their subjects from engaging in the war. By treaties between the United States and the powers of Spain, Prussia, Sweden, and the Netherlands, the subjects of either, found cruising as privateers against the other, when their respective countries were at peace, might be treated as pirates; and the United States had provided for the trial and punishment of subjects of powers making such treaties found so engaged. (U. S. Laws, ix. 175.)

"When the civil war in the United States was imminent, and after the rebellion had organized a government, Earl Russell sought to obtain the accession of what appeared to be the coming sovereignty, to the Declaration of Paris; but the rebel government, by the proclamation of Jefferson Davis of April 17, 1861, offered letters of marque to subjects of all countries. Immediately upon the commencement of hostilities, and a few days after the proclamation by the President of the United States of a blockade of all the ports of the rebel coast, Mr. Seward sent an offer of the United States to the great powers to accede to the Declaration of Paris as it stood, without waiting for the previously proposed amendment to be adopted by all the powers. After a long correspondence between Mr. Seward, Mr. Adams, Lord Russell, Mr. Dayton, and M. Thouvenel, from which it appeared that France and Great Britain would act together,

and which developed several technical difficulties, Lord Russell at last agreed to separate conventions of Great Britain and France with the United States, adopting the four points of the Declaration of Paris; adding, however, in his letter to Mr. Adams (of July 31, 1861), these words: 'I need scarcely add, that, on the part of Great Britain, the engagement will be prospective, and will not invalidate any thing already done.' The United States Government requesting an explanation of this sentence, Lord Russell transmitted the following form of declaration to be made by Great Britain on signing the convention: 'In affixing his signature to the convention of this day between Her Majesty the Queen of Great Britain and Ireland, and the United States of America, the Earl Russell declares, by order of Her Majesty, that Her Majesty does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States.' The United States Government declined to make a convention with this *ex parte* declaration attached, and Great Britain declined to proceed without it; so the project of the accession of the United States to the declaration fell through. (Earl Russell to Mr. Adams, Aug. 19, 1861. Mr. Adams to Mr. Seward, Aug. 30, 1861. Mr. Adams to Earl Russell, Aug. 23, 1861. Mr. Seward to Mr. Adams, Sept. 7, 1861.)

"Earl Russell, in a letter to Mr. Adams of Aug. 28, 1861, explains the purpose of Great Britain in making the special declaration. It was this: As Great Britain has acknowledge belligerent rights in the Confederacy, and the Confederacy was not a party to the Declaration of Paris, Great Britain must, in consistency, regard the Confederate privateers as lawful belligerents; while the United States, claiming sovereign jurisdiction over the Confederacy, and that all its inhabitants were subject to the laws and treaties of the United States, might argue that the parties to the declaration would be bound, after the accession of the United States, to treat the privateers of the so-called Confederate States as pirates.

"Mr. Seward and Mr. Adams replied, that the United States were not willing to agree to a special restriction, by one power, of a declaration of so general and lasting a character, and to which so many were parties, and as to which there was no mutuality proposed in case of civil dissensions in the dominions of the other powers. (U. S. Dip. Corr. 1861.)

"In the civil war, Congress authorized the President to issue letters of marque; but he did not make use of the power. The rebel government offered its letters of marque: but, as nearly all the maritime powers had warned their subjects that if they served in privateers in the war, their governments would not interfere to protect them, and as the United States had threatened to treat such persons as pirates, and the naval power of the United States was formidable, no avowedly foreign private armed vessels took letters of marque; and the ostensibly Confederate vessels were commissioned as of its regular navy. Mr. Seward instructed Mr. Adams to say to Lord Russell, that, if the United States made use of privateers under the act, it would be only to suppress the piracy of European gunboats fitted out and sent from their ports, in disregard of their obligations to the United States, to prey upon American commerce. (Letter of

July 12, 1862: U. S. Dip. Corr. 1862, p. 135.) The provisions in the treaties of 1794 with Great Britain, and of 1778 with France, that the subjects of either, serving as privateers against the other, when the respective nations were at peace, might be treated as pirates, have expired; and they have not been renewed in the later treaties."

Wheaton, Dana's Note 173, pp. 455, 456.

The advantages of privateers may be set forth as follows: "(1) That seamen thrown out of work by war can thus gain a livelihood and be of use to their country. (2) A nation which maintains no great navy is thus enabled to call into activity a temporary force, on brief notice, and at small cost. Thus an inferior state, with a large commercial marine, can approach on the sea nearer to an equality with a larger rival, having a powerful fleet at its disposal. And as aggressions are likely to come from large powers, privateering may be a means, and perhaps the only effectual means, of obtaining justice to which a small commercial state can resort."

Woolsey, p. 202.

The United States declined to become a party to the Declaration of Paris "although it secured what" that "country had so long been wishing for,—the greater freedom of neutral vessels. The reluctance to adopt the principles of the declaration, was owing to a cause already suggested—that the relinquishment of privateering would be a gain to nations which keep on foot a large naval force, but not to the United States, where a powerful navy is not maintained, on account of its great cost, and its danger to civil liberty. On the breaking out of a war, therefore, with a nation powerful at sea, the United States must rely, to a considerable extent, on merchant vessels converted into vessels of war." It was declared, however, by Secretary of State Marcy, in a note, dated July 28, 1856, to the French minister, that the United States "will readily agree to an arrangement, by which the private property of the subjects or citizens of a belligerent power shall be exempted from seizure by public armed vessels of the enemy, except it be contraband of war, and that 'with this we will consent to the placing of privateering under the ban of the law of nations.' It will be the policy of" the United States, "hereafter, it may be presumed, in all treaties, to couple the abolition of privateering with the entire immunity of merchant ships engaged in a lawful trade. * * * If the larger exemption of all innocent private property from the liabilities of war, to which the United States offers to be a party, should become incorporated in the law of nations, her attitude will have been one of great advantage to the world. If not, her plea of self-defense in keeping up the system of privateering will probably be regarded in another age as more selfish than wise."

Woolsey, pp. 205, 314.

"It is not held to be piracy, if a privateer or other armed vessel, exceeding its commission, prey on commerce admitted by its sovereign to be friendly. Offenses of this kind entitle the injured party to compensation, but the jurisdiction belongs to the vessel's sovereign, who is responsible."

Woolsey, p. 234.

"Until lately all maritime states have * * * been in the habit of using privateers, which are vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility which are permissible at sea by the usages of war. Before giving a privateering commission, it is usual for the government issuing it to require the lodgment of caution money or the execution of a bond by way of security against illegal conduct on the part of the holder, and against a breach of the instructions which are issued for his guidance. The commission is revocable on proof of its misuse being produced, and by the English law at least the owners of the vessel were liable in damages; it was also usual for the Lords of the Admiralty to institute proceedings in the Admiralty Court upon complaint of ill-conduct. As a further safeguard, a privateer is liable to visit by public vessels of war; and as she is not invested with a public character, neutral ships of war are permitted to verify the lawfulness of the commission under which she sailed by requiring its production. * * *

Hall, p. 546, 547.

"A disposition has occasionally been shown to regard as pirates[1] persons taking letters of marque from one of two belligerents, their own state being at peace with the other belligerent. In 1839, France being at war with Mexico, Admiral Baudin, commanding the fleet of the former power, notified that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not Mexican subjects by birth, would be considered piratical and treated as such; and in 1846, during the war of the United States with Mexico, President Polk suggested in a message to Congress that it might be a question for the criminal courts to decide whether bearers of commissions, issued in blank by the Mexican government, and sold to foreigners by its agents abroad, ought not to be regarded as pirates.[2] That the views entertained by the French and American governments on these occasions were at variance with usage is confessed, but some writers hold that usage ought to be modified in conformity with them. It is argued that the change should be made because vessels acting in the manner contemplated would be disavowed by the state to which they properly belong, and because it would decline to be responsible for them; because, on the other hand, they do not belong to the state of which they carry the commission, since 'they fulfil none of the conditions required for the impress of a national character;' they are thus destitute of any nationality. The reasoning does not appear to be very conclusive. A vessel cannot be treated as piratical for the mere absence of a clear national character, because a clear national character is at least as much wanting to the vessels of a simply belligerent community as to foreign vessels employed by a sovereign state. In both cases, the acts purporting to be done being in themselves permissible, or at least not criminal, when authorized by a state or other political community, and criminal when not so authorised, the essential point must be that a responsible state or equivalent of a state shall really exist; and it is impossible to maintain that the grant of letters of marque or

[1] See also Oppenheim, vol. 2, p. 100, Note 2.
[2] Messages and Papers of the Presidents, vol. 4, p. 496.

commissions to foreign vessels does not impose complete responsibility upon the government issuing them. That a practice of granting such letters or commissions would be highly objectionable, and that it would give rise to the most serious abuses, is indisputable; but to say this, and to say that the persons receiving them ought to be treated as pirates, are two very distinct things. The true safeguard against the evils which would spring from the practice would be to conclude treaties[1] binding the contracting powers not to issue such letters or commissions."

Hall, pp. 273–275.

Privateers "may be defined as vessels owned and manned by private persons, but empowered by a commission from the state, called a Letter of Marque, to carry on hostilities at sea. The law declared the commission to be revocable for bad conduct on the part of the privateer; and other means were taken to secure that she did not violate the laws of war, such as the lodgment of security and the enforcement of liability to search by public vessels of the country whose flag she carried. But, in spite of all precautions, privateers were always a most unsatisfactory force. At first neutral as well as belligerent subjects were allowed to cruise against commerce, and privateering became a lucrative occupation for the lawless and adventurous spirits who abounded among sea-faring populations. The scandal grew so great, as modern trade developed, that in the eighteenth century most of the states of Europe passed laws for the punishment of any of their subjects who took Letters of Marque authorizing depredations upon the commerce of any power with which they were at peace. In the United States similar provisions were placed upon the Statute Book by Congress in 1797 and 1816. The result of legislative acts such as these, joined with the higher moral standard of which they were at once the symptom and the effect, was to bring to an end privateering by neutrals. But there still remained the use as commerce destroyers of private vessels belonging to belligerent subjects and fitted out by them for purposes of personal enrichment.

"In Europe opinion turned against these more defensible privateers, and, though they were freely used in the great struggle between England and Revolutionary and Imperialist France, great seamen denounced them, and charged them with hoisting whatever colors were necessary to effect the capture of any merchantmen that came in their way. At the commencement of the Crimean War in 1854 England and France notified their determination to rely upon public armed ships alone, and not to issue Letters of Marque to private individuals. During the conflict both sides refrained from authorizing private vessels to cruise against commerce, and at its close the abolition of privateering was decreed by the first article of the Declaration of Paris. Meanwhile in America opinion was divided, the prevailing tendency being to look on privateers as a cheap method of defence for a power which possessed a large seaborne commerce and a small navy, which was the condition of the United States at that time. They therefore declined to sign the Declaration unless it included the further reform of exempting

[1] For list of treaties of this character, see notes at pp. 274–275, Hall.

innocent private property at sea from belligerent capture. The question was allowed to drop, and American assent was withheld from the Declaration. But privateers were not used in the fierce struggle with the seceding South, or in the war of 1898 with Spain. Indeed, none have been sent forth to prey on seaborne trade in any of the wars which have taken place between civilized nations since 1856. It can hardly be doubted that no more will be heard of them in future maritime conflicts. Enlightened opinion condemns them, and the interests of commerce are opposed to their continued existence. The powers that still decline to sign the Declaration of Paris may possibly have escaped the technical obligation to refrain from using them, though even this is doubtful, since universal observance for more than fifty years can be pleaded in favor of the rule of prohibition. But these states are not likely to run counter to the general sense of the civilized world, and bring down upon themselves as belligerents the ill-will of all neutral powers who possess a sea-borne trade. And even if they were willing to take the risk, the cost of an effective cruiser is now so enormous that few private individuals would be able to meet it."

Lawrence, pp. 521–523.

"During the eighteenth century the practice grew up that belligerents granted letters of marque to private ships of their own subjects only. However, privateering was abolished by the Declaration of Paris in 1856 as between the signatory Powers and others who joined it later. And although privateering would still be legal as between other Powers, it will in future scarcely be made use of. In all the wars that occurred after 1856 between such Powers, no letters of marque were granted to private ships."

Oppenheim, vol. 2, p. 100.

The license from the sovereign to capture property at sea "was granted by letters of marque or of reprisal, or of marque and reprisal. The former term has been connected by some with *marca*, a boundary, the letters being an authority to make captures outside the boundary of the territory; but it may be derived much more easily from *marcare* or *marchiare*, words which are found in documents of the thirteenth century in connection with *pignorare*, apparently in the sense of marking goods for a claimant's security. If the prince on the other side considered the claim to be unfounded, or the compensation obtained to be excessive, he issued letters of *contre-marque*. The measures which a subject was thus licensed to take for his own redress were called special reprisals."

Westlake, vol. 2, p. 9.

The United States declined to adhere to the Declaration of Paris "on the ground that, so long as the private property of enemies remains capturable at sea, it would operate unfairly towards powers not maintaining large public navies. As between the powers which have subscribed to the Declaration, light has been thrown on its precise meaning by the regulations respectively made for the Russian volunteer fleet, the mail steamers subsidised by this and other states, and the volunteer fleet contemplated by Prussia in 1870. None of these regulations having excited any serious remonstrance, there appears to be an understanding that what is prohibited is not the use in

war of privately owned ships under commanders at least temporarily belonging to the public navy, but the combination of private ownership with private command. Privateers presenting that combination have not been employed since 1856, even by the few powers which have not adhered to the Declaration. *The Alabama* and her consorts which devastated the commerce of the United States during the great civil war were public ships of the Confederate States' navy."

Westlake, vol. 2, p. 177.

The phrase "La Course" that occurs in the first article of the Declaration "dates from a period, when it was the practice of States, whenever there was occasion to have recourse to an armed expedition on the high seas against another State, to grant Letters of Marque to the commanders of private cruisers, authorising them to make reprisals against the vessels and cargoes of the subjects of the other State. By-and-by Commissions of War come to be issued by Sovereign Princes to private ships fitted out either by their own subjects, or by the subjects of other Powers, so that it was competent for a Power which had no public ships of war of its own to harass the commerce of its enemy by issuing Letters of Marque and Reprisals not merely to vessels of its own subjects, but to the vessels of the subjects of other Powers, and when Commissions of War came to be granted to both classes of such vessels in the Sixteenth Century, they had lawful authority to exercise belligerent rights against neutrals as well as against the enemy. It can well be imagined, as the crews of such ships were brought together by the prospect of plunder, and were under no naval discipline, that, when a single corsair or privateer hove in sight on the high seas, it caused a greater terror to a neutral merchant ship than a fleet of Public ships of war.

"In the present century however as the practice of States in entrusting their defence on land to regiments of foreign origin serving them for pay has generally been discarded, so the practice of granting commissions of war to the subjects of foreign States, serving for plunder, has fallen into disrepute, to say nothing of the license of maritime warfare so conducted being intolerable to the civilisation of the present age. That a main object, which the two Allied Powers in the war of 1854 against Russia had in view, was to put an end to the practice of belligerents issuing Letters of Marque and Reprisals to the subjects of neutral States, is confirmed by the Memoir of M. Drouyn de Lhuys, [read before the French Academy on April 4, 1868].

"'What influenced especially the English Government was the fear of America inclining against us, and lending to our enemies the cooperation of her hardy volunteers. The Maritime population of the United States, their enterprising marine, might furnish to Russia the elements of a fleet of privateers, which attached to its service by Letters of Marque and covering the seas with a network would harass and pursue our commerce even in the most remote waters. To prevent such a danger the Cabinet of London held it of importance to conciliate the favourable disposition of the Federal Government. It had conceived the idea of proposing to it at the same time as to the French Government and to all the Maritime States, the conclusion of an arrangement, having for its object the suppression of privateering, and permitting to be treated as a Pirate every one, who in time of

war should be found furnished with Letters of Marque. This project, which was in the end abandoned, is evidence of the disquiet felt by England. We thought, as they did, respecting privateering, a barbarous practice which marked too often, under an appearance of patriotic devotion, violence excited by the allurement of lucre. At former epochs, justified by the fury of war, it was able in the midst of numerous iniquities, to give rise to some heroic action, to transmit even to history some glorious names. But we considered it to be incompatible henceforth with the usages of civilized nations, which cannot allow private persons to be armed with the rights of war, and which reserve their terrible application to the public power of Established States.'

"Such was the object in view of the Allied Powers in the war against Russia, according to the highest authority. We find also a statement from the same authority, namely, the French Minister for Foreign Affairs, in his Report to the Emperor of the French, of 29th March, 1854, that the motive of the Allied Powers was to mitigate the disastrous effects of war upon the commerce of neutral nations and to relieve it from all unnecessary shackles, and accordingly the Emperor of the French published a Declaration at the conclusion of which he announced that he had no intention to deliver 'Lettres de Marque pour autoriser les armements en Course.' On the other hand the British Government issued a corresponding Declaration on 28th March, 1854, announcing that it was not the intention of the Queen of the United Kingdom to issue Letters of Marque for the commissioning of privateers."

Twiss—Belligerent Right on High Seas, pp. 9–12.

"No state shall * * *; grant letters of marque and reprisal."

Constitution of United States, Article 1, sec. 10.

During the War of 1812, "the legislature of New York went so far as to pass an act to *encourage privateering associations*, by authorizing any five or more persons, who should be desirous to form a company for the purpose of annoying the enemy and their commerce, by means of private armed vessels, to sign and file a certificate, stating the name of the company and its stock, etc., and that they and their successors should thereupon be a *body politic and corporate*, with the ordinary corporate powers. Laws, N. Y. 38 Sess. c. 12, Oct. 21st, 1814."

Kent, vol. 1, p. 108, note (a).

"*Be it enacted* * * *, That any subject or citizen of any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished before any circuit court of the United States for the district into which such person may be brought, or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted, and punished in such courts."

Act of March 3, 1847 (9 Stat. 175).

"*Be it enacted* * * *, That in all domestic and foreign wars the President of the United States is authorized to issue to private armed vessels of the United States, commissions, or letters of marque and general reprisal in such form as he shall think proper, and under the seal of the United States, and make all needful rules and regulations for the government and conduct thereof, and for the adjudication and disposal of the prizes and salvages made by such vessels; Provided, That the authority conferred by this act shall cease and terminate at the end of three years from the passage of this act."

Act of March 3, 1863 (12 Stat. 758).

The power granted the President by this act was, however, "not exercised during the rebellion."

Kent, vol. 1, p. 108.

"All provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."

Act of the Congress of the United States, March 3, 1899 (30 Stat. 1007).

"April 22, 1898, the Department of State, in a telegraphic instruction to the diplomatic representatives of the United States, declared among other things that, in the event of hostilities with Spain, the 'policy' of the United States 'will be not to resort to privateering.' This announcement was reaffirmed in a proclamation issued by the President on the 26th of April."

Moore's Digest, vol. 7, p. 541.

"The Spanish Government, by a royal decree of April 23, 1898, embodying the rules which it proposed to observe during the war, reserved the right to issue letters of marque. Of this reservation Spain afterwards took no advantage."

Moore's Digest, vol. 7, p. 542.

Article 2 of the Russian Prize Regulations, 1895, adopts the Declaration of Paris in respect to privateering.

"117. *Capture of Privateers or Pirates.*—When prize is made of a privateer regularly provided with letters of marque by a government that has not adhered to the Declaration of Paris, you will proceed in the same manner. [as provided in paragraph 116, p. —]. The master, officers, and crew of this privateer shall be treated as indicated in paragraph 146 for warships.

"The master, officers and crew of any vessel armed for privateering by a government signatory to the Declaration of 1856, being liable to the penalties provided for the crime of piracy, should be considered not as prisoners of war but as arrested, and be sent to the nearest French authorities for prosecution under the laws of the Republic."

French Naval Regulations, 1912.

"The term 'letter of marque,' though originally indicating the commission issued to a privateer, came in the course of time to be applied almost exclusively to a trading vessel that was authorized to make

reprisals, whether in peace or in war. The term 'privateer' was reserved for a vessel which, although privately fitted out, was employed solely as a cruiser. Hamilton, therefore, in his circular of August 4, 1793, said: 'The term privateer is understood not to extend to vessels armed for merchandise and war, commonly called with us *letters of marque*, nor, of course, to vessels of war in the immediate service of the government of either of the powers at war.' Am. State Papers, For. Rel. 1, 140."

Moore's Digest, vol. 7, p. 536.

"Though she [a merchant vessel] has arms to defend herself in time of war, in the course of her regular commerce, this no more makes her a privateer than a husbandman following his plow, in time of war, with a knife or pistol in his pocket, is thereby made a soldier.' Mr. Jefferson, Sec. of State, to Mr. Morris, Aug. 16, 1793, 1 Wait's State Papers, 147; Am. State Papers, For. Rel. 1, 167."

Moore's Digest, vol. 7, p. 536.

"Writing to Lord Lyons, Mr. Seward said: 'There are no private-armed or uncommissioned vessels. A portion of our public marine service are commissioned through the War Department as transports; a portion through the Treasury, as revenue. All are subjected to the regulations of the Navy as to foreign and maritime war.' Mr. Seward, Sec. of State, to Lord Lyons, British Min., Jan. 4, 1864, MS. Notes to Great Britain, X, 453."

Moore's Digest, vol. 7, 538.

"Article 15. Treacherous and barbarous methods. Ruses of war are considered permissible. Methods, however, which involve treachery are forbidden.—*Institute (1913), p. 177.*

Stratagems and Perfidy.

"*Stratagems*, in war, are snares laid for an enemy, or deceptions practiced on him, without perfidy, and consistent with good faith. They are not only allowable, but have often constituted a great share of the glory of the most celebrated commanders. 'Since humanity obliges us,' says Vattel, 'to prefer the gentlest methods in the prosecution of our rights, if, by a stratagem, by a feint devoid of perfidy, we can make ourselves masters of a strong place, surprise the enemy, and overcome him, it is much better, and is really more commendable to succeed in this way than by a bloody seige or the carnage of a battle. Thus, feints and pretended attacks are frequently resorted to, and men or ships are sometimes so disguised as to deceive the enemy as to their real character, and, by this means, enter a place or obtain a position advantageous to their plan of attack or of battle. But the use of stratagems is limited by the rights of humanity and the established usages of war. Even if devoid of perfidy, and consistent with the faith due to the enemy, they must not violate commercial usage, or contravene the stipulations of particular treaties. Vattel mentions the case of an English frigate, which, in the war of 1756, is said to have appeared off Calais and made signals of distress, with a view of decoying out some vessel, and actually seized a boat and some sailors who generously came to her assistance. If the fact be true, that unworthy stratagem deserves a severe punishment. It tends to damp a benevolent charity which should be held sacred in the eyes of mankind, and which is so laudable even between enemies. Moreover, making signals of distress is asking assistance, and, by that very action, promising perfect security to those who give the friendly succor. Therefore the action attributed to that frigate implies an odious perfidy.' Ortolan refers to the conduct of an English frigate and two vessels at Barcelona, in 1800, as of the same character as that of the English frigate off Calais, described as above, by Vattel. On the 4th of September, 1800, the English took forcible possession of a Swedish vessel, then neutral, near Barcelona, put a large number of English soldiers and marines on board, and, entering the harbor in the night, under this neutral flag, and in a neutral vessel, surprised and captured two Spanish frigates which were lying at anchor. Ortolan denounces this as an act of perfidy, and as not being a stratagem allowable by the usages of war. This act may be viewed in different lights. So far as the surprise of the Spaniards is concerned, it was a legitimate stratagem. It was their duty to be prepared for such an attack, and they were properly punished for their neglect to take the proper and ordinary precautions to pre-

vent it. So far as the seizure, and the use of the Swedish vessel, and the treatment received by its captain and crew at the hands of the English, are concerned, it was a gross violation of neutral rights which would have justified Sweden in declaring war, on satisfaction being refused. As between Spain and Sweden, it was a gross neglect of neutral duty, on the part of the latter, in not requiring England to restore the captures thus unlawfully made under the Swedish flag. With respect to the actual *attack* made by the English under a false flag, it was a direct violation of their own maritime laws and the established usages of nations, as will be shown in the next paragraph. * * *

"We will now inquire how far stratagems of this kind are allowable at sea, or rather how far a vessel may act under false colors. 'To sail and chase under false colors,' says Sir William Scott, 'may be an allowable stratagem in war, but *firing*, under false colors, is what the maritime law of this country (England) does not permit; for it may be attended with very unjust consequences; it may occasion the loss of the lives of persons, who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection.'[1] It will be noticed that the prohibition to fire under false colors, is here put upon the ground of local law, no reference being made to any general rule of international jurisprudence. 'It is a rule of the law of nations,' says Pistoye et Duverdy, 'that, on the sea, a vessel cannot attack another vessel before having made known its nationality, and having put the vessel which it encounters in a position of declaring its own nationality.' The ancient rule of maritime law, as stated by Valin, was, that the *affirming gun* (*coup de semonce ou d'assurance*) could be fired only under the national flag. Such were the provisions of the ancient ordonnances of France. But article thirty-three of the Arrêté du 2 prairial merely prohibits the firing a shot (*tirer à boulet*) under a false flag, and the law of the 10th of April, 1825, article third, provides that captains and officers, who *commit acts of hostility* under a flag other than that of the state by which they are commissioned, shall be treated as pirates. Ortolan says that the affirming gun may be fired under false colors, but all acts of hostility must be under the national flag. Massé and Hautefeuille seem to adopt the opinion that the affirming gun (*coup de semonce*) should be fired only under national colors. But as such gun is in no respect an act of hostility, we can perceive no good reason why it may not be fired under false colors. * * *

"*Deceitful intelligence* may be divided into two classes; false representations made in order that they may fall into the enemy's hands and deceive him, and the representations of one who feigns to betray his own party, with a view of drawing the enemy into a snare; both are justifiable by the laws of war. Commanders sometimes make false representatives of the number and position of their troops, and of their intended military operations, for the purpose of having them fall into the enemy's hands, and of deceiving him; this is not only allowable, but is regarded as a commendable *ruse de la guerre*. If an officer deliberately makes overtures to an enemy, offering to betray his own party, and then deceives that enemy with false information, his procedure is deemed infamous; nevertheless, the enemy

[1] The *Peacock* (1802), 4 C. Rob. 187.

has no right to complain of the treachery, for he should not have expected good faith in a traitor. But if the officer has been tampered with by offers of bribery, he may lawfully feign acquiescence to the proposal, with a view to deceive the seducer: he is insulted by the attempt to purchase his fidelity, and he is justified in revenging himself by drawing the tempter into a snare. 'By this conduct,' says Vattel, 'he neither violates the faith of promises, nor impairs the happiness of mankind, for criminal engagements are absolutely void, and ought never to be fulfilled, and it would be a fortunate circumstance if the promises of traitors could never be relied on, but were, on all sides, surrounded with uncertainties and danger. Therefore, a superior, on information that the enemy is tempting the fidelity of an officer or soldier, makes no scruple of ordering that subaltern to feign himself gained over, and to arrange his pretended treachery so as to draw the enemy into an ambuscade.' * * *".

Halleck, pp. 402–405.

Use of Enemy's Flag.

"It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held * * * that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell. The rule, disobedience to which is considered to entail grave dishonour, has been based on the statement that 'in actual battle, enemies are bound to combat loyally and are not free to ensure victory by putting on a mask of friendship.' In war upon land victory might be so ensured, and the rule is consequently sensible; but at sea, and the prohibition is spoken of generally with reference to maritime war, the mask of friendship no longer misleads when once fighting begins, and it is not easy to see why it is more disloyal to wear a disguise when it is obviously useless, than when it serves its purpose."

Hall, pp. 558, 559.

Stratagems.

"Occasionally strategems are criticised upon grounds which imply some confusion of mind. In the year 1800 an English squadron is said to have seized a Swedish galliot on the high seas near Barcelona, and put a force of soldiers and marines on board, which under cover of the apparent innocence of the vessel was able to surprise and mainly contribute to the capture of two Spanish frigates lying in the roads. As is very frequently the case with occurrences which are made the subject of animadversion against England in foreign works on international law, owing to a too common neglect to compare the English with the foreign sources of information, the true facts were wholly different from those alleged. No ruse was employed, and the Swedish vessel had nothing to do with the attack (James's Naval Hist. iii. 50.) Assuming the facts however to be correctly stated by M. Ortolan (Dip. de la Mer, liv. iii, ch. i), it would be interesting to know how he and M. Calvo (sec. 2063) could separate the case from that of a vessel flying, as she is confessedly at liberty to do, false colours until the moment before firing her first gun. It is not pretended that the Swedish galliot was laid alongside the frigates and that the boarding was effected from her, nor

that a single shot was fired from her; yet the English are accused of 'treason towards the enemy.' It seems pretty clear that the writers quoted must have allowed themselves to be influenced by the fact that the vessel was really Swedish, although the impression produced upon the minds of the Spanish commanders was entirely independent of this circumstance. However distinctly Swedish the galliot may have been in build and rig, she might have become British property by condemnation for carriage of contraband or breach of blockade. She would then have been an English ship using the legitimate ruse of flying the Swedish flag, and the Spaniards had no means of knowing that this was not actually the case. M. Ortolan and Calvo point out rightly, on the assumed facts, that a gross breach of neutrality was committed; but as between the two enemies, the breach of neutrality would have had no bearing on the character of the acts done, and the deception effected would have been of a perfectly legitimate kind."

Hall, p. 558, note. (See also, Baker's Halleck, 4th ed., vol. 1, p. 625.)

Stratagems.

Strategems "are ruses practiced on the enemy in order to mislead him and put him off his guard. That they may be used at all is due to the fact that war is a conflict of wits quite as much as a conflict of arms. In ordinary peaceful intercourse men are expected to avoid deceits, though in certain games feints of a particular kind are allowed by the rules; and he who breaks the general undertaking is a moral wrong-doer, and often a legal offender also. In war things are reversed. The general undertaking is confined to comparatively few matters. It is as immoral to violate these conventions as it would be to lie and cheat in ordinary society. But outside them, every kind of misleading device is legitimate, and the most honorable of commanders constantly resort to them. Some branches of the general undertaking between belligerents are now defined and regulated by special agreements, while others derive their force from usage only. Chapter III of the Hague Code for war on land deals with flags of truce: the Geneva Convention prescribed the red cross on a white ground as the badge that exempts the personnel and material of the hospital and ambulance service from hostile attack: the ninth Hague Convention of 1907 introduces a new sign to be hoisted over buildings entitled to be spared in bombardments by naval forces, and the tenth Hague Convention of 1907 sets forth the marks whereby military hospital ships are to be known, and the presence of which gives them protection. In all these cases the signatory powers would be dishonoring their own signatures as well as violating a wholesome and humane rule, if they either fired on the signs when properly used, or used them for other purposes than those which they indicate. Any strategem that involved such action would be grossly illegal, and might subject its authors to severe reprisals from the enemy and punishment from their official superiors."

Lawrence, pp. 551, 552.

Use of False Flag.

"Ruses are customarily allowed in sea warfare within the same limits as in land warfare, perfidy being excluded. As regards the use

of a false flag, it is by most publicists considered perfectly lawful for a man-of-war to use a neutral's or the enemy's flag (1) when chasing an enemy vessel, (2) when trying to escape, and (3) for the purpose of drawing an enemy vessel into action. On the other hand, it is universally agreed that immediately before an attack a vessel must fly her national flag. * * *

"Vattel (III. sec. 178) relates the following case of perfidy: In 1755, during war between Great Britain and France, a British man-of-war appeared off Calais, made signals of distress for the purpose of soliciting French vessels to approach to her succour, and seized a sloop and some sailors who came to bring her help. Vattel is himself not certain whether this case is a fact or fiction. But be that as it may, there is no doubt that, if the case be true, it is an example of perfidy, which is not allowed."

Oppenheim, vol. 2, pp. 262, 263.

Oppenheim in his note at page 262 of volume 2, International Law, cites the following instances of the use by a belligerent of the flag of another nation: During the Spanish-American War in 1898, "two American men-of-war made use of the Spanish flag (see Perels, p. 183). And during the war between Turkey and Russia, in 1877, Russian men-of-war in the Black Sea made use of the Italian flag (see Martens, II, sec. 103, p. 566)."

Baker in his 4th edition of Halleck, Volume 1, pages 624, 625, cites the following instances of ruses in naval warfare: "The following example, however, has been verified by affidavit made before the (colonial) mayor of New York, February 13, 1783. In that year the '*Sybille*,' a French frigate of thirty-eight guns, Captain le Comte de Kergaron de Somaria, enticed the British ship "*Hussar*," twenty guns, Captain J. M. Russell, by displaying an English ensign reversed in the main shrouds, and English colours over French at the ensign staff. She was also under jury-masts, had some shot-holes, and in every way intimated herself to be a distressed prize to some of the British ships. Captain Russell at once approached to succour her, but she immediately, by a preconcerted and rapid movement, aimed at carrying away the bowsprit of the "*Hussar*," raking, and then boarding her: This *ruse de guerre*, of so black a tint, was only prevented taking full effect by the promptitude of Captain Russell, who managed to turn his ship in such a way as only to receive half the raking fire. He then engaged with the "*Sybille*," and, on eventually capturing her, publicly broke the sword of the French captain, who, he considered, had sullied his reputation by descending to fight the "*Hussar*" for above thirty minutes under false colours, and with signals of distress flying. 'She' (the "*Hussar*"), said Captain Russell, 'had not had fair play, but Almighty God had saved her from the most foul snare of the most perfidious enemy.' He confined the captain of the "*Sybille*" as a State prisoner. It appears that the latter was subsequently brought to trial by his own Government, but was acquitted. Again, in 1813, two merchants of New York, encouraged by a promise of reward from the American Government, formed a plan for destroying the British 74-gun ship "*Ramillies*," Captain Sir Thomas Masterman Hardy. A schooner was laden with several casks of gunpowder, having trains leading from a species of gunlock, which, upon the principle of clock-work, went off at a given period

after it had been set. On deck were some casks of flour, as it was known that the "*Ramillies*" was short of provisions, and it was supposed that Captain Hardy would immediately seize her to revictual his ship. Thus murderously laden, she approached the "*Ramillies*," which detached a boat with thirteen men and a lieutenant to cut her off. The crew immediately abandoned the ship, which was taken by the lieutenant. A few hours afterwards she blew up, the lieutenant and ten of the soldiers were killed, and the other three men were shockingly scorched."

"While we are bound to hold sacred all promises to an enemy, and keep all engagements, expressed or implied, we may take any advantage of an enemy possible by stratagem or surprise without perfidy; indeed to make use of such means is highly commendable. On this account the circulation of any intelligence calculated to deceive an enemy is allowable.

"A vessel may hoist false colors to decoy an enemy within range of her guns, but to make signals of distress for such a purpose would be an act of the greatest perfidy. Vattel mentions the reported case of an English frigate making signals of distress off Calais, and making prisoners of some French sailors who went to her assistance; and says that, if true, such an action deserves a severe punishment."

Marine International Law, Glass, p. 38.

"197. The Commander may chase, but under no circumstances may fire, under false colors."

Naval Prize Law, Holland, citing The *Peacock*, 4 C. Rob., 185.

Holland's Naval Prize Law, Art. 200, provides that a commander, if the state of the weather prevents hailing, may fire two blank guns and, if necessary, a shot across the bow of a pursued vessel; "but before firing, the commander, if he has chased under false colours or without showing his colours, should be careful to hoist the British Flag and Pendant."

"ART. 7. The use of false colors in war is forbidden, and when summoning a vessel to lie to, or before firing a gun in action, the national colors should be displayed by vessels of the United States."

United States Naval Code, 1900.

"ART. 52. The commander of a warship may, when pursuing a ship, either not show the colours of a ship of the Imperial Navy, or show false colours. He must, however, before ordering her to stop, invariably fly the colours of a ship of the Imperial Navy."

Japanese Regulations, 1904.

Sir William Scott, in the case of *The Peacock* (1802) (4 C. Rob., 183), said: "To sail and chase under false colors, may be an allowable strategem of war, but firing under false colors, is what the maritime law of this country does not permit; for it may be attended with very unjust consequences; it may occasion the loss of the lives of persons, who, if they were apprized of the real character of the cruiser, might, instead of resisting, implore protection."

In this case an American merchantman had been captured by an English privateer after being fired upon while the privateer was flying French colors.

The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.—*Article 1, Hague XI, 1907.*

"ARTICLE XX. In case of war between the two nations, the mail packets of the two offices shall continue their navigation without impediment or molestation until six weeks after a notification shall have been made on the part of either of the two governments, and delivered to the other, that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports."

Postal Convention, December 15, 1848, between Great Britain and the United States (9 Stat., 965–970).

Article IX of the Postal Convention of 1861 between the United States and Mexico, contains a provision similar to that last above quoted. (12 Stat. 1205.)

"IX. In case of war between the two nations, the packets of the two Administrations shall continue their navigation, without impediment or molestation, until a notification is made on the part of either of the two Governments of the discontinuance of postal communications; in which case they shall be permitted to return freely, and under special protection, to their respective ports."

Postal Convention of August 30, 1890, between Great Britain and France, British State Papers, vol. 82, p. 91–97.

"ARTICLE 32. * * * Visit of post packets must, as Article 53 says, be conducted with all the consideration and all the expedition possible. * * *"

Institute (1913), p. 181.

"ARTICLE 53. B. *Postal correspondence.*—Postal correspondence, whatever its official or private character may be, found on the high seas on board an enemy ship, is inviolable, unless it is destined for or proceeding from a blockaded port. * * *

"If the ship on which the mail is sent be seized, the correspondence is forwarded by the captor with the least possible delay."

Institute (1913), p. 188.

"In 1793 vessels carrying mails for the English or French Post Office authorities, were permitted to convey the mails between the ports of Great Britain and France, notwithstanding the war between the two countries."

Halleck (4th ed., Baker's), vol. 2, p. 124 (note).

"In the treaty of 1848, between the United States and Great Britain, it is provided that, in case of war between the two nations, the mail-packets shall be unmolested for six weeks after notice by either government that the service is to be discontinued; in which case they shall have safe-conduct to return. During the Mexican war, British mail-steamers were allowed by the United States forces to pass in and out of Vera Cruz. During the civil war in the United States, the United States Government adopted a rule, that 'public mails of any friendly or neutral power, duly certified or authenticated as such,' found on board captured vessels, 'shall not be searched or opened, but be put, as speedily as may be convenient, on the way to their designated destination. This instruction, however, will not be deemed to protect simulated mails verified by forged certificates or counterfeited seals.' These instructions from the Secretary of State to the Secretary of the Navy, of Oct. 31, 1862, were communicated to the ministers of foreign governments. (Dipl. Corr. 1863, Part 1, p. 402.) In the case of the prize *Peterhoff*, in which the question was as to the actual ownership and destination of the cargo, the court at first directed the mails found on board to be opened in presence of the British Consul, and that he be requested to select such letters as appeared to him to relate to the cargo and its destination, and reserve the rest of the mail to forward to its destination. The British Consul refused to comply with this request, protesting that the mail should be forwarded unopened. On appeal to the Secretary of State, the United States Attorney at New York received directions to forward the entire mail to its destination unexamined, notwithstanding there was reason to believe some letters in it would furnish evidence as to the cargo; and Mr. Seward wrote to Mr. Adams, April 21, 1863, to that effect; adding, 'I shall, however, improve the occasion to submit some views upon the general question of the immunities of public mails found on board of vessels visited under the belligerent right of search. The subject is one attended with many embarrassments, while it is of great importance. The President believes it is not less desirable to Great Britain than it is to the United States, and other maritime powers, to arrive at some regulation that will at once save the mails of neutrals from unnecessary interruption and exposure, and, at the same time, prevent them from being made use of as auxiliaries to unlawful designs of irresponsible persons seeking to embroil friendly States in the calamities of war.'

"The rule in Mr. Seward's instructions of 31st October, 1862, relates only to public mails duly authenticated; and the capturing government reserves the right to make sure of the genuineness of the authentication. When the vessel is a private one, but carrying mails under a government contract, like the Cunard or Peninsula and Oriental steamers, and the lines subsidized by the United States for that purpose, a government mail-agent is usually on board, having them in charge. Although this fact does not in law protect the

mails from search, yet it affords opportunity for general arrangements between nations, and makes special arrangements between the captors and the mail-agent, in particular cases, more probable. No settled practice of nations has excepted public mails, carried in private vessels, from search made for the purpose of ascertaining the character, employment, destination, or ownership of that particular vessel or cargo, or for the purpose of ascertaining whether the vessel is acting as a carrier or despatch-boat in the service of the enemy's government. In principle and on authority, there is no such exemption. The belligerent may search the private vessel to see if she or her cargo, or any part of it, is, for any cause, lawful prize. The law allows immunity from search to no deposit of information. The danger of giving immunity from examination to the mails would be, not only that neutrals might so carry all contraband despatches for the enemy's government and in its service, without much danger of detection or prevention, but the actual papers and instructions of the ship and cargo would always be placed in its own mail, and only the ostensible ones be produced; and so the ship would not be obliged to incur even the slight risk and inconvenience of sending the real papers by a different conveyance. Moreover, there is, in fact, no public guaranty for the character of the contents of the mail. It is well understood that the postal officers usually know or notice little of the externals of the letters and packets in the mail, and know nothing of their contents. There is no rule by which governments undertake to be answerable for the neutral and innoxious character of the contents of the mails, or authorize or require their agents to make search beforehand, and to refuse objectionable matter. Moreover, it is settled that, in analogous cases, public neutral custody is not such a guaranty as will exclude belligerent search. Convoy by neutral ships of war does not exclude the visit and search of the convoyed vessels by the belligerent cruiser; and, in one case (the *Madison*, Edwards, 224), Sir W. Scott said, that, if papers are really of a character which neutrals ought not to carry, the fact that they were put on board by a neutral ambassador (not being within the immunity of diplomatic despatches) would not alter the case.

"During the civil war in the United States, the British Government demanded that the United States should adopt the rule, that 'all mail-bags, clearly certified as such, shall be exempt from seizure and visitation.' (Mr. Stuart to Mr. Seward, Oct. 29, 1862.) The letter adds: 'If this principle is admitted, the necessity of discussing the question, as matter of strict right, that Her Majesty's mails on board a private vessel should be exempted from visitation and detention, might be avoided.' Two days afterwards, Mr. Seward issued the instructions to the Navy Department referred to above. This exempts from search 'public mails of any neutral or friendly power, duly certified or authenticated as such,' with the proviso that the instructions shall not 'be deemed to protect simulated mails verified by forged certificates and counterfeit seals.' The exemption was not admitted as of strict right, but conceded on grounds of policy and comity. It seems to have left the matter thus: If the ostensible authentication turns out to be false, there has been no violation of the conceded immunity; if it turns out to be genuine, any examination

in the nature of a search is a violation of that immunity. The searcher takes the risk, and his government the consequences. It is like the case of the stopping and visiting of an ostensible foreign merchantman by a cruiser, in time of peace, on suspicion that she is a pirate, or is a vessel of the cruiser's own country under false colors, engaged in the violation of municipal law. If the ostensible national character turns out real, the cruiser is *in delicto*, and his government is *in culpa*." Mr. Seward's letter of April 21, 1863, proposing some general regulation on the subject of the immunity of public mails, does not seem to have been followed by any results."

Wheaton, Dana's Note 229, pp. 659–661.

Treatment of Mail Steamers.

"The great increase which has taken place of late years in the number of steamers plying regularly with mails has given importance to the question whether it is possible to invest them with further privileges. At present, although secure from condemnation, they are no more exempted than any other private ship from visit: nor does their own innocence protect their noxious contents, so that their post-bags may be seized on account of dispatches believed to be within them. But the secrecy and regularity of postal communication is now so necessary to the intercourse of Nations, and the interests affected by every detention of a mail are so great, that the practical enforcement of belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt now be shown in a naval war to mail vessels and their contents: and it may be assumed that the latter would only be seized under very exceptional circumstances. France in 1870 directed its officers that 'when a vessel subjected to visit is a packet boat engaged in postal service, and with a Government agent on board belonging to the state of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and dispatches on board:' and it is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. At the same time it is impossible to overlook the fact that no National guarantee of the innocence of the contents of a mail can really be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary manner through its Post Offices. To give immunity from seizure as of right to neutral mail-bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it: and it is not difficult to imagine occasions when the absence of such power might be a matter of grave importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral government on board that no dispatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing.

"No usage has hitherto formed itself on the subject. During the American Civil War it was at first ordered by the government of the U. S. that duly authenticated mail-bags should either be forwarded unopened to the foreign department at Washington, or

should be handed after seizure to a naval or consular authority of the country to which they belonged, to be opened by him, on the understanding that documents to which the belligerent government had a right should be delivered to it. On the suggestion of the English government, which expressed its belief 'that the government of the U. S. was prepared to concede that all mail-bags, clearly certified to be such, should be exempt from seizure or visitation,' these orders were modified; and naval officers were directed, in the case of the capture of vessels carrying mails, to forward the latter unopened to their destination."

[1] Hall, pp. 703–705.

No immunity from capture is given by international law to enemy mail boats though "mail-bags are now protected by a definite rule of law. Here and there we may find a treaty between two states for the exemption from capture in time of war of the vessels employed in the conveyance of their over seas correspondence; but such agreements are not common. Great Britain has four only, Holland, the United States, Belgium, and France, being the other parties. Each of these Conventions stipulates that the arrangement may be brought to an end by either side in giving notice to the other, and it is very doubtful whether any of them would stand the strain of a war. In fact, the movement in favor of exempting social and commercial correspondence from the severities of warfare has taken the direction of a demand for the protection of the communications themselves rather than the vehicles which carry them. Occasionally neutrals have attempted to obtain for their mail steamers freedom from belligerent search; but in no case has absolute immunity been conceded. Conditions more or less onerous in character have always been insisted on. President McKinley in his Proclamation of April 26, 1898, at the beginning of the war between the United States and Spain, declared with regard to neutral mail-boats that their voyages were not to be interfered with 'except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade'; and in 1900, during the Boer War, Lord Salisbury made a somewhat similar declaration to Germany. These represent the high-water mark of concession, and it will be seen how far they fall short of complete immunity." * * *

Postal correspondence of the enemy "was rendered inviolable by the 11th of the Hague Convention of 1907, whether it was official or private, whether found on board a neutral or an enemy ship. But the immunity was not extended to vessels that might happen to carry letters, nor even to regular mail steamers, though it was agreed that these latter were not to be searched 'except when absolutely necessary, and then only with as much consideration and expedition as possible.' If the vessel were detained, the correspondence was to be forwarded by the captor as soon as possible. The only case in which the old right of search, and, if need be, of capture was retained, was that of communications proceeding by sea to and from a blockaded port. Russia has refrained from signing this convention, but all the other powers have accepted it. Belligerents are now able to send their war-like messages by submarine cables or wireless telegraphy, and naturally they prefer these quick and comparatively safe methods to the slower and more dangerous course of

forwarding despatches by ocean-going vessels. While this change was taking place on the one hand, on the other, sea borne correspondence was increasing every day, owing to the growth of international commerce, and the extension of travel and social intercourse. Finally it became evident that the small possible gain to belligerents by interfering with the convenience of the civilized world was far outweighed by the trouble and loss that the interference caused. When this was borne in upon rulers they were willing to grant immunity from belligerent capture at sea to mail-bags and letters."

Lawrence, pp. 459, 462.

"Whereas there is no general rule granting immunity from capture to enemy mail-boats, enemy *mail-bags* do, according to article 1 of Convention XI, enjoy the privilege of such immunity, for it is there enacted that the postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral or enemy ship at sea, is inviolable, and that, in case the ship is detained, the correspondence is to be forwarded by the captor with the least possible delay. There is only one exception to this rule of article 1, for correspondence destined to or proceeding from a blockaded port does not enjoy the privilege of immunity.

"It must be specially observed that postal correspondence, and not parcels sent by parcel post, are immune from capture."

Oppenheim, vol. 2, p. 237.

"It must be emphasized that, although a vessel may be seized and punished for unneutral service, according to article 1 of Convention XI * * * the postal correspondence of neutrals or belligerents, whatever its character, found on board is inviolable."

Oppenheim, vol. 2, p. 524.

"The practice as to neutral mail-bags which was adopted in the American civil war has been sanctioned, and extended to belligerent mail bags" by Articles 1 and 2 of the 11th Hague Convention of 1907.

"It must be mentioned to the credit of Germany that this beneficent regulation was proposed at the conference by her delegate Herr Kriege, who explained that 'postal correspondence' is not intended to include parcels sent by post."

Westlake, vol. 2, pp. 184, 185.

"ART. 102. The Mail-bags carried by Mail Steamers will not, in the absence of Special Instructions, be exempt from search for Enemy Despatches."

Naval Prize Law, Holland.

"ART. 20. A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. Mail steamers under neutral flags carrying such dispatches in the regular and customary manner, either as a part of their mail in their mail bags, or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect

to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken."

United States Naval Code, 1900.

"ART. 68. When the commander of a warship captures a mail steamer, he shall remove from the ship, in their sealed condition, mail bags which he considers harmless, and take steps to dispatch them, at the very first opportunity to their destination."

Japanese Regulations, 1904.

"7. The mails found on board neutral or enemy ships at sea from neutrals or belligerents, whether of an official or private nature, are inviolable. In case of the seizure of the ship, they are to be forwarded with the least possible delay by the captor (Convention XI, Articles 1 and 2, 2d Hague Conference)."[1]

German Prize Rules, 1909.

"11. As respects postal correspondence [found on enemy vessels], you will act in conformity with the prescriptions of Article XVI,[2] below."

French Naval Regulations, 1912.

"122. Postal correspondence of neutrals or belligerents, whether official or private in character, found at sea upon a neutral or enemy vessel is inviolable. If the vessel is seized, the correspondence is sent on by the captor with the least possible delay."

"123. The preceding provisions do not apply in case of violation of blockade to correspondence to or from a blockaded port."

"124. They are likewise applicable only between Powers that have ratified the Hague Convention of October 18, 1907, relative to certain restrictions in the exercise of right of capture in naval war, or have adhered to that Convention, and only if the belligerents are all parties to such Convention."

"125. In the case of paragraphs 123 and 124, you may acquaint yourself with the official and personal letters addressed to enemy authorities or to persons residing within enemy territory or territory occupied by the enemy, and found on board captured vessels; if any of them are of interest, you will send them without delay to the Minister of the Navy and send the others to their destination with the least possible delay."

French Naval Regulations, 1912.

Article 1, Hague XI, 1907, substantially appears as Art. 41 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the *Peterhoff* (1866) (5 Wall., 28, 61), the Court said: "The captain of a merchant steamer like the *Peterhoff* is not privileged from search by the fact that he has a government mail on board; on the contrary he is bound by that circumstance to strict performance of neutral duties and to special respect for belligerent rights."

In the case of the *Panama* (1900) (176 U. S. 535), "it was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

[1] "Mail of the following states does not enjoy this privilege: China, Montenegro, Russia."

[2] Sec. 122–125, French Naval Regulations.

"There are instances in modern times, in which two nations, by conventions between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of mail ships of the contracting parties in case of war between them have never, we believe, gone further than to provide as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that this service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective forts. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton, (8th ed.) pp. 659–661, Dana's note; Calvo, (5th Ed.) Sec. 2378, 2809; De Boeck, Sec. 207, 208. De Boeck, in Sec. 208 after observing that, in the case of mail packets between belligerent countries, it seems difficult to go further than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country as follows: 'It agrees without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept, and seize the enemy's mail packets.'

"The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mails between the United States and the enemy's country. Nor can the authority, to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since become, enemy's country. Moreover, at the time of the capture of the *Panama*, this proclamation had not been issued. Without express order of the Government, a merchant vessel is not privileged from search or seizure by the fact that it has a Government mail on board. The *Peterhoff*, 5 Wall., 28, 61.

"The mere fact, therefore, that the *Panama* was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture."

In the *Argan* (1904) (2 Rus.-Jap. P. C., p. 49), it was argued that, as the captured enemy vessel had mail on board, "she ought to be released in accordance with the opinion of jurists and the most advanced principles of International law. But the fact of an enemy vessel carrying mails is not recognized in International law as now in force, or in the laws of Japan, as a ground of exemption from capture, so that this objection is over-ruled."

The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.—*Article 2. Hague XI, 1907.*

"Article 17. When the vessel to be visited is a mail boat, it shall not be visited if the officer of the government the flag of which it flies, who is on board the ship, declares in writing that the mail ship is carrying neither dispatches nor troops for the enemy, nor contraband of war for the account of or destined to the enemy."

Institute (1882), p. 48.

"ARTICLE 34. Illegal transportation of * * * dispatches for a belligerent, hitherto in the same category as the carrying of contraband, shall be treated as prohibited transport service, according to the second part of the international regulations on contraband of war."

Institute (1897), p. 142.

"ARTICLE 53. * * * The inviolability of postal correspondence does not exempt mailboats from the laws and customs of maritime war as to ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible."

Institute (1913), p. 188.

"Occasionally neutrals have attempted to obtain for their mail steamers freedom from belligerent search; but in no case has absolute immunity been conceded. Conditions more or less onerous in character have always been insisted on. President McKinley in his Proclamation of April 26, 1898, at the beginning of the war between the United States and Spain, declared with regard to neutral mail-boats that their voyages were not to be interfered with 'except on the clearest grounds of suspicion of a violation of law in respect to contraband or blockade;' and in 1900, during the Boer War, Lord Salisbury made a somewhat similar declaration to Germany. These represent the highwater mark of concession, and it will be seen how far they fell short of complete immunity. The Hague Convention, which grants it to mails merely provides with regard to mail-boats that they are not to be searched 'except when absolutely necessary.'"

Lawrence, p. 459.

Referring to the interception of the British mail steamer *Osiris* by the Russian naval vessel *Krabri* in May, 1904, in the Mediterranean, Lawrence says:

"But, even though there be no good reason for objecting to the search by belligerents of neutral merchantmen in general, the question arises whether the fact that the *Osiris* was a mail-steamer does not give her special immunities. In attempting an answer we may put aside the few anomalous cases where the mail-boats are public vessels, but carry passengers and merchandise as well as letters. The Ostend boats are examples. They are the property of the King of the Belgians as reigning sovereign. In the case of the *Parlement Belge* it was decided that the subordinate and partial use of them for trading purposes did not take away their public character and deprive them of the immunities which belonged to them by virtue of it. Whether this doctrine would be extended to cover exemption from belligerent search in time of war, it is impossible to say with certainty. But we may be sure that, if such vessels should in future be held free from molestation on the same footing as ordinary public vessels employed exclusively on state business, the neutral power whose ships they are will be made responsible for any abuse of their immunity by carrying contraband of war or performing unneutral services. They are, however, so exceptional that we may leave them out of account. Ordinary mail-steamers are simply merchantmen of a particular kind, owned by private persons, and carrying mail-bags by contract with the state, as one department of their trade.

"In recent times a practice has grown up of granting special favours to such mail-boats in time of war, if they are neutral and willing to accept the conditions imposed. The United States has been the pioneer in this matter. During her war with Mexico she allowed British mail-steamers to pass unmolested in and out of the port of Vera Cruz, which came into her possession for a time in 1847. In 1862, when the American Civil War was at its height, the Government of Washington exempted from search the public mails of any neutral power, if they were duly sealed and authenticated, but it was added that the exemption would not protect 'simulated mails verified by forged certificates and counterfeit seals.' If a vessel carrying mails rendered herself subject to capture for other reasons, she might be seized, but the mail-bags were to be forwarded unopened to their destination. The example thus set was followed by France in 1870. At the commencement of her great war with Germany she announced that she would take the word of the official in charge of the letters on board a regular mail-steamer of neutral nationality as to the absence of any noxious communications. The Proclamation of President M'Kinley at the beginning of the war with Spain in 1898 went further still. It declared that 'the voyages of mail-steamers are not to be interfered with, except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.' A similar indulgence was granted by Great Britain in the course of the Boer War to steamers flying the German mail-flag. They were not to be stopped on mere suspicion that there might be unlawful despatches in their bags. On the other hand, many modern cases may be mentioned where no indulgence, or a very limited one, was given. For instance, in 1898 Spain did not duplicate the American concession, and in 1902 Great Britain and Germany would not allow neutral mail-steamers to pass through their blockade of Venezuelan ports, but stopped them instead, and after overhauling their

correspondence and detaining what seemed noxious, sent the rest ashore in boats belonging to the blockading squadron.

"We see then that practice is by no means uniform. It is impossible, therefore, to argue that the usage of the last half-century has conferred upon the vehicles of the world's commercial and social communications an immunity from belligerent search which they did not before possess. The utmost we can venture to assert is that such a usage is in process of formation, and is in itself so convenient that it ought to become permanent and obligatory, due security being taken against its abuse. This last condition will be difficult of attainment. No government agent on board a mail-steamer can be aware of the contents of the letters for which he is responsible. There would be a terrible outcry if he took means to make himself acquainted with them. His assurance, therefore, as to the innocence of the communications in his bags can be worth but little, even though it is given in all good faith. States must face the fact that to grant immunity will mean that their adversaries in war will use neutral mail-boats for the conveyance of noxious despatches made up to look like private correspondence. Probably it will be worth while to take the risk of this rather than dislocate the affairs of half a continent by capturing and delaying its correspondence. While general freedom was given, it might be wise to reserve a right of search and seizure in circumstances of acute suspicion.

"At present nothing of the kind has been done. Our Government has no right to demand from Russia that our mail-boats be left unsearched by its cruisers. But it may represent that great inconvenience will arise if the right of search is enforced in its naked severity, and ask both of the powers at war to make concessions similar to those which we made at Germany's request in 1901. There is no need to go so far as the United States have recently gone in the Barrundia case and subsequent incidents of the like kind, when they claimed for their mail-steamers a privileged position with regard to political refugees who had taken shelter on board them. We do not want to assimilate the mail-packet to the warship, but we do desire to establish the principle that the innocent correspondence of neutrals all over the world shall not suffer because two powers have seen fit to break the peace. And we are more likely to succeed by means of quiet diplomatic pressure and courteous reasoning than by heroics about an outrage which was no outrage at all, but at worst a discourtesy. It may be well to add here that neither private correspondence nor diplomatic and consular correspondence is regarded as noxious matter. Only despatches relating to naval and military affairs come within that category, and subject the carriers to pains and penalties.

"In stopping and searching the *Osiris* by means of one of the ships of her regular navy, Russia did no more than exercise in a harsh and reactionary manner a right which belonged to her as a belligerent power. She would have been better advised had she granted some of the concessions to neutral mail-steamers which have been so frequent of late years. The United States made no sacrifice of dignity when in 1862 she accepted the suggestion of Great Britain that 'all mail-bags clearly certified as such shall be exempt from seizure and visitation,' merely adding thereto the proviso against fraud quoted on a previous page. But if Russian pride shrank from

even the semblance of yielding to foreign pressure, the Russian Government might have adopted from the proposed Maritime Code of the *Institut de Droit International* the rule that a mail-boat should not be visited when an official of the Government whose flag flew over her declared in writing that she carried neither despatches nor troops for the enemy, nor contraband of war. Russia would have gained far more indirectly from the goodwill of those who benefited by such a concession than she can hope to obtain directly in the whole course of her war by standing upon the strict letter of an oppressive rule. But she went beyond her obsolete rights, and contrived most ingeniously to violate International Law in a variety of ways, when on July 15, 1904, the *Smolensk*, a cruiser of her Volunteer Fleet, stopped the German mail-packet *Prinz Heinrich* in the Red Sea, and took out of her a number of mail-bags, which she examined at leisure, and then transferred, with the exception of two, to the P. & O. steamer *Persia*, which she stopped for that purpose. To begin with, the *Smolensk* had no right to perform any acts of war at all. But, postponing this point, which we will deal with later when considering the case of the *Malacca*, we may assert with confidence that a belligerent cruiser which takes goods by force out of a neutral vessel, not because she believes them to be contraband, but in order that she may examine them to find out whether they are contraband, commits a grave offence. There is a right to capture contraband, and when it is exercised the ship which carries the unlawful goods should be brought in for adjudication with its suspicious cargo. This is the normal procedure. Some powers, however, allow the contraband goods to be taken out of the vessel, when her captain is willing to surrender them, and they are so small in quantitiy as to be easily carried by the capturing cruiser. But no power has ever dreamed of allowing goods to be taken from under its flag in order that a belligerent commander might do at leisure on his own ship what he ought to do on the neutral ship before he presumes to effect a seizure. No right to touch them exists till grave suspicion, if not absolute proof, arises against them. If the Russian procedure were lawful, neutral trade in time of war could be harried by a belligerent to the verge of extinction, supposing him to be at all strong at sea. He has only to stop every vessel of a power he wishes to injure, and take out as much property as he can carry for examination elsewhere, and very soon there will be nothing sent for carriage under that neutral's flag.

"Further, the *Smolensk* had no business to force the *Persia* to do for it its own work of sending on the mail-bags to their proper destination. It is not a part of the duty of neutrals to fetch and carry for belligerents who have got themselves into a quandary. It is to be wished that the captain of the *Persia* had refused the task committed to him, and taken the consequences whatever they might have been. The less we, or any other neutral, concede to unauthorised Russian demands, the sooner will the present Russian attempt to force her own crude notions upon her neighbours cease, and the sooner it ceases the better for the peace of the civilised world.

"Lastly, we may note that the commanders of the Russian cruisers seem to think they are at liberty to seize and confiscate any correspondence going to Japan. A more monstrous delusion never entered

the head of a naval captain puffed up with national pride. The law on this matter was established during the great naval struggle which marked the end of the eighteenth and the beginning of the nineteenth centuries. It comes to this. Private correspondence goes free, but neutrals are not allowed to carry an enemy's despatches. By this phrase is meant 'official communications * * * between officers, whether military or civil, in the service of the enemy on the public affairs of their Government.' But even to this rule of interpretation there are exceptions. 'Communications between the enemy and neutral foreign Governments,' and 'official communications between the enemy's home Government and the enemy's ambassador or consul resident in a neutral state,' are not to be interfered with. The quotations I have given are from our own Admiralty Manual, and they form an excellent summary of the generally-accepted rules on the subject. Japan has embodied them, with a few verbal alterations, in her Prize Law. Russia, in the seventh of the 'Rules' issued by the Emperor on February 28, enumerates among the acts forbidden to neutrals, 'the transport of the enemy's * * * despatches and correspondence.' Apparently these words are construed to cover private communications. Whether they were drawn up with that intention or not may be doubtful; but it is worthy of notice that Section 34 of the Maritime Code of the *Institute de Droit International* speaks of 'correspondence officielle de l'ennemi,' whereas the Russian rule, which is evidently founded on it, leaves out the qualifying adjective. If the obnoxious practice is continued, neutrals should, in self-defence, join in one emphatic protest. We thought we had advanced far on the road of tenderness to neutral interests since the violent times of the great Revolutionary and Napoleonic contests. It seems as if we had gone back instead; and it is necessary to reverse the engines before we make further progress in the wrong direction. In the special case before us, the German Government appears to have been satisfied with the reply to its remonstrance; but Mr. Balfour announced no general concession in his speech on August 25 to the deputation of ship-owners connected with the trade to the Far East."

War and Neutrality in the Far East, 2d ed., pp. 188–200.

"No general rule of International Law exists granting enemy mail-boats immunity from attack and seizure, but the several States have frequently stipulated such immunity in the case of war by special treaties. Thus, for instance, Great Britain and France by article 9 of the Postal Convention of August 30, 1860, and Great Britain and Holland by article 7 of the Postal Convention of October 14, 1843, stipulated that all mail-boats navigating between the countries of the parties shall continue to navigate in time of war between these countries without impediment or molestation until special notice be given by either party that the service is to be discontinued. * * *

"A mail-boat [of a neutral] is * * * quite as much as any other merchantman, exposed to capture for rendering unneutral service."

Oppenheim, vol. 2, pp. 236, 526, 527.

"7. The following acts, forbidden to neutrals, are assimilated to contraband of war: The transport of enemy * * * despatches

and correspondence * * *. Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be captured and condemned."

Russian Imperial Order of Feb. 14, 1904. Russ-Jap. P. C., vol. 1, p. 348.

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

Proclamation, April 26, 1898, of the President of the United States issued at the beginning of Spanish-American war. (30 Stat. 1771.)

"A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure; but not when she is a mail packet and carries them in the regular and customary manner, either as a part of the mail in her mail bags, or separately, as a matter of accommodation and without special arrangement or remuneration. The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

Instructions to Blockading Vessels, United States Navy Department General Order No. 492, June 20, 1898.

Lord Salisbury in a telegram dated January 16, 1900, to the British Ambassador at Berlin said, referring to the seizure of German mail steamers for the alleged carriage of contraband to the Boer Republic, "that orders had been given for the present that no more mail-steamers were to be arrested on suspicion alone until further orders."

In this telegram the observation was made "that the term mail-steamer could not safely be applied to any steamer that had a bag of letters on board, and that it required definition. We understand by mail-steamers steamers of subsidized lines, and consequently owned by persons whom the German Government considered as respectable."

British State Papers vol. 94, p. 999.

In an instruction dated January 17, 1900, from Lord Salisbury to the British Ambassador to Berlin relating to the seizure by the British naval forces of German mail steamers enroute to South Africa during the Boer War, the statement was made that instructions had been issued that the detention of such vessels "on suspicion only, was undesirable if the vessel carried mails, unless contraband of war were found on board."

Until further information is received by mail, "Her Majesty's Government cannot decide whether the British naval officers in any respect exceeded the right of search accorded by international practice to belligerents. They recognize, however, that in the case of steamers carrying mails, that right should be exercised with all possible consideration, and only resorted to when the circumstances are clearly such as to justify the gravest suspicion."

British State Papers, vol. 94, p. 1001.

In a speech delivered January 19, 1900, in the Reichstag, Count von Bülow, in summing up the representations made by the German Gov-

ernment to Great Britain in regard to the action of the British naval officers during the Boer war said: "Fourthly, we stated it to be highly desirable that the English Government should instruct their commanders not to arrest steamers flying the German mail-flag.

"The English Government hereupon issued an order that in future German mail-steamers are not to be stopped and searched upon suspicion only. This order will remain in force until another arrangement has been arrived at between the two Governments."

British State Papers, vol. 94, p. 1007.

"7. * * *

"The inviolability of mails does not exempt neutral mail steamers from the laws and usages of war on the sea, nor from capture; but they shall be searched only when urgent, with all possible consideration and despatch."

German Prize Rules, 1909.

"85. You have the right to search all merchant vessels that you meet. You will not search mail ships except in case of necessity, as pointed out in Article XVII."

French Naval Regulations, 1912.

"126. Inviolability of postal correspondence does not remove neutral mail ships from the laws and customs of war on sea concerning neutral merchant vessels in general. Nevertheless, the search should be effected only in case of necessity, with all circumspection and all speed possible. (See Annex I, Postal Convention between France and Great Britain of August 30, 1890)."

French Naval Regulations, 1912.

Article 2, Hague XI, 1907, substantially appears as Art. 42 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the *Calchas* (1905) (2 Rus.-Jap. P. C., p. 118), the facts were as follows:

During the Russian-Japanese War in 1904, a Russian naval vessel seized the British steam-ship *Calchas* while on a voyage from one neutral port to another. During this voyage the steam-ship was to call at enemy ports for the delivery of certain cargo and mail. She was seized while on her way to any enemy port and taken before the Prize Court of Vladivostock. Among her cargo were a number of sacks of mail that had been taken on board at Tacoma for Japanese, Corean and neutral ports. The mail matter was opened and examined by the Prize Court and sixteen bags addressed as follows were retained:

"From Tacoma, 4 bags to Tokio, 2 bags to Yokohama, 1 bag to Nagasaki; and 8 bags from Hamburg to Tokio and 1 bag to Corea. From these bags the Court took out 15 packages addressed to the Japanese Government, and in the presence of Lieutenant ——— opened 74 private letters, which, as they were of no interest for them, were sent to the staff of the commander of the fleet with the entire mail, with the exception of the 15 packages. On the opening of these it was found that there was nothing in them relating to the cargo or the sailing of the *Calchas*, and in two only, Nos. 4 and 11,

were there matters of political character. In the first there was a secret report from the Japanese Ambassador at Washington to the Japanese Minister for Foreign Affairs * * *. In the second there was a secret report from the Japanese Consul at San Francisco to the Japanese Minister for Foreign Affairs. The other letters contained matter relating principally to accounts, financial affairs, and reports on the war from Japanese Consuls and Diplomatic Agents, on questions of commerce, and also statements of various foreign newspapers, including some cuttings from the same; also information of the births and deaths of Japanese subjects, and as to Japanese labour abroad. With regard to the two secret communications a full translation was made, by order of the Court, * * * and after the translation the Court found that, although they were no doubt of a political character, there was nothing in them which could have any influence on the affairs of the army or navy."

The Court decided that: * * *

"3. The mails carried by this steamer for the Government of Japan had no direct connection with the army or navy."

In the appeal taken in this case the Supreme Prize Court of Russia said:

"In accordance with Article 7 of the Imperial Order of the 14th of February, 1904, 'the following acts, forbidden to neutrals, are assimilated to contraband of war: the transport of enemy troops, of enemy dispatches and correspondence, the supply of warships and transports to the enemy * * *. Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be captured, and condemned.' There can be no doubt that a neutral, having undertaken to transport enemy troops, dispatches and correspondence, to a certain extent enters the service of the enemy country and openly takes part in warlike operations. The motives for so taking part may be attributed either to pecuniary advantages, political sympathy, or force of circumstances. The right, however, of condemnation by a belligerent is incontestable with regard to a neutral vessel which has thus come under the flag of the enemy. But this right of condemnation by a belligerent in respect of neutral property or vessels exists only when the circumstances of the case prove that there can be no doubt of the culpability of the neutral, i. e., when it can be established that the neutral was actually engaged in the transport of enemy troops, despatches, or correspondence. It would be necessary to prove that the neutral had undertaken to transport such troops or despatches and correspondence to the enemy country or Government; it would be necessary to ascertain positively the intention of a neutral to render services to a belligerent in the prosecution of warlike operations on land and sea. According to these views, a neutral vessel engaged by an agent of a belligerent Power for the special purpose of carrying despatches addressed to military, naval, or diplomatic authorities may legally be captured and condemned if the fact of the engagement be proved. But the carriage of ordinary correspondence from neutral ports would, in accordance with the Regulations of the Universal Postal Union not alone be sufficient ground for regarding a neutral as having rendered assistance to one of the belligerents to the injury of the other.

"It is in this sense that Article 7 of the Imperial Order of the 14th of February, 1904, must be understood. This declaration could not intend to abolish the acknowledged privileged rights of mail steamers, or to annul the Regulations established by the Universal Postal Union for the benefit of all nations. These Regulations remain operative without interruption during war time, and, so far as it is practically possible, even between the belligerents. * * *

"For the foregoing reasons no blame can be attached to the master of the *Calchas* for having received at Tacoma 122 mail-bags for delivery at neutral, Japanese, and Corean ports en route. He could not know the contents of these sealed bags given to him by the postal authorities of the United States, nor could he be held responsible for the contents of the correspondence contained in them.

"On the other hand, the Vladivostock Prize Court was entitled to acquaint itself with the contents of these bags, and to seize the correspondence addressed to the Japanese Government or Japanese Government institutions and officials. The Prize Court acted accordingly, and retained 15 packets addressed to the Japanese Government at Tokio. All the remaining correspondence was forwarded to the staff of the commander of the fleet, and proper steps were then taken for the transmission of the correspondence to its destination.

"On perusal of the packets in question containing Government correspondence, it appeared that only two contained reports from the Japanese Minister at Washington and Japanese Consular Agents abroad which were of a political nature. One contained a report from the Japanese Minister, ———, to the Minister for Foreign Affairs at Tokio enclosing two secret papers, Nos. 30 and 31; the other was a report from the Japanese Consul-General at San Francisco. Other despatches referred to domestic affairs, cash accounts, and the general management of Japanese diplomatic and Consular offices in America and Europe. Although these reports were certainly of political interest, they contained no information likely to influence the progress of the operations of our army and fleet.

"In view of these circumstances, there are no grounds upon which Article 7 of the Imperial Order of the 14th of February, 1904, could be applied to the *Calchas*, nor for regarding her master as having carried to the enemy the so-called analogues of contraband of war, i. e., enemy despatches and correspondence. The *Calchas* is, therefore, not liable to condemnation for carrying correspondence to the enemy * * *.

"On the other hand, there can be no doubt that, on discovering a considerable number of bags with mails on board the *Calchas* addressed to enemy ports, the Russian cruiser *Gromoboi* was legally justified in arresting the steamer and suspecting the neutral character of her cargo. * * *

"Finally, taking into consideration that the captured steamer was discovered with an enormous cargo which might, according to circumstances, either be regarded as absolute or conditional contraband of war, her detention and conveyance to Vladivostock was perfectly justified in accordance with the facts and the indisputable rights of belligerent ships.

"For these reasons the Supreme Prize Court recognizes that there were sufficient legal grounds for the capture of the *Calchas* and for

her conveyance to Vladivostock as ordered by the commander of the separate detachment of cruisers of the Pacific squadron. The capture and the conveyance to Vladivostock were carried out in accordance with all the principles of Russian and international law."

In the *St. Kilda* (1908) (1 Rus.-Jap. P. C., p. 188), the Court said: "It is true that under Article 7 of the Imperial Order of the 14th February, 1904, neutral vessels may, under certain circumstances be seized and condemned when caught in the act of carrying enemy dispatches and correspondence; but the Supreme Prize Court, in its decision in the case of the *Calchas*, has already declared that there are no sufficient grounds for condemning a vessel when it is not chartered specially for the purpose of carrying the enemy correspondence, but is merely carrying mails from neutral ports to enemy ports in the course of its voyage, such mails being, moreover, in sealed bags, the contents of which could not be known, and a fortiori in cases where the enemy correspondence itself could not affect the military operations of the war. The correspondence on board the *St. Kilda*, which is mentioned in the despatch of the Minister of Marine, was being carried under such conditions. From the minutes drawn up by the Commission which opened the bags, it appears that the greater part of the thirteen packets seized came from Consuls in European ports; five of the packets, addressed to Marshal the Marquis Yamagata, came from Tutikorin, in India, where there were neither Japanese nor Russian troops, and therefore their contents, even if of political and military importance in themselves, could not have an important bearing on the military operations of the late war, which was conducted at a considerable distance from India.

"Consequently, neither the *St. Kilda* herself, nor her cargo, with the exception of the parcels as to which a contrary decision has been given above, were liable to condemnation."

Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.—*Article 3, Hague XI, 1907.*

"ARTICLE 47. *Vessels used exclusively for fishing along the coast and for local trade.*—Vessels used exclusively for fishing along the coast, or for local trade, under which term are included those used exclusively for piloting or for light-house service, as well as the boats meant principally for the navigation of rivers, canals, and lakes, are exempt from seizure, together with their appliances, rigging, tackle and cargo.

"It is forbidden to take advantage of the harmless character of said boats in order to use them for military purposes while preserving their peaceful appearance."

Institute (1913), p. 185.

"ARTICLE 49. *Suspension of immunities.*—The exceptions considered in Articles * * * 47 * * * cease to be applicable if the vessels to which they refer participate in the hostilities in any manner whatsoever or commit other acts which are forbidden to neutrals as unneutral service.

"The same suspension occurs if, summoned to stop to submit to search, they seek to escape by force or by flight."

Institute (1913), p. 186.

"ARTICLE 59. Members of the personnel of an enemy ship which, because of its special character, is itself exempt from seizure, cannot be held as enemies."

Institute (1913), p. 189.

"1 Emerigon, des Ass. 129, 130, 457, refers to ordinances of France and Holland, in favor of protection to fishermen; and to the like effect was the order of the British government in 1810, for abstaining from hostilities against the inhabitants of the Feroe Islands and Iceland. * * * The American Commissioners (John Adams, Benjamin Franklin, and Thomas Jefferson), in 1784, submitted to the Prussian Minister a proposition to improve the laws of war, by a mutual stipulation not to molest non-combatants, as cultivators of the earth, fishermen, merchants and traders in unarmed ships,

and artists and mechanics inhabiting and working in open towns. These restrictions on the rights of war were inserted in a treaty between the United States and Prussia, in 1785."

Kent, vol. 1, p. 100 (note).

"Fishing boats have, also, as a general rule, been exempted from the effects of hostilities. As early as 1521, while war was raging between Charles V and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit, should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British government, on the alleged ground that some French fishing boats were equipped as gun boats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve, and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts; and after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishing was again allowed on both sides. French writers consider this exemption as an established principle of the modern law of war, and it has been so recognized in the French courts, which have restored such vessels when captured by French cruisers."

Halleck, p. 493.

"Hostile ships, with whatever goods on board, have been uniformly regarded as prizes of war. But from the operations of war, one class of vessels, engaged in an eminently pacific employment, and of no great account in regard to national resources, has often been exempted; we refer to vessels engaged in coast-fisheries. It appears that this exemption was allowed centuries ago. Froissart is cited as saying in his Chronicle that 'fishermen on the sea, whatever war there be in France and England, do no harm to one another; nay, rather, they are friends, and aid one another in case of need.' The liberty of the enemy's fishermen in war has been protected by many French ordinances, and the English observed a reciprocal indulgence; but in 1798, during the French Revolution, the English government ordered its cruisers to seize French and Dutch fishermen and their smacks. Soon after, on remonstrance from the First Consul of France, the order was withdrawn, as far as the coast-fisheries in the strict sense were concerned; and during the wars of the empire, this peaceful and hardy class of laborers enjoyed exemption from capture. In the instructions given by the French Minister of Marine to naval officers in 1854, at the outbreak of the late war with Russia, we find the same rule followed. 'You must put no hindrance,' say the instructions, 'in the way of coast-fishery even on the coasts of the enemy, but you will be on your guard that this favor, dictated by an interest of humanity, draws with it no abuse prejudicial to military or maritime operations. If you are employed in the waters of the White Sea, you will allow to continue without interruption (repression in case of abuse excepted) the exchange of fresh fish, provisions, utensils, and tackling, which is carried on habitually between

the peasants of the Russian coasts of the province of Archangel and the fishermen of the coast of Norwegian Finmark.' Such has been the practice of some of the principal Christian nations in protecting the coast-fisheries of enemies, but as yet this usage cannot be called a part of international law."

Woolsey, pp. 303, 304.

"The doctrine of the immunity of fishing-boats is mainly founded upon the practice with respect to them with which France has become identified, but which she has by no means invariably observed. During the Anglo-French wars of the Middle Ages it seems to have been the habit of the Channel fishermen not to molest one another, and the French Ordonnances of 1543 and 1584, which allowed the Admiral of France to grant fishing-truces to subjects of an enemy on condition of reciprocity, did no more than give formal effect to this custom. It does not appear to what degree the power vested in the Admiral was used during the early part of the seventeenth century, but by the Ordonnances of 1681 and 1692 fishing-boats were subjected to capture, and from that time until the war of American Independence both France and England habitually seized them. Throughout that war and in the beginning of the revolutionary wars both parties refrained from disturbing the home fisheries, but the English government in 1800 distinctly stated that in its view the liberty of fishing was a relaxation of strict right made in the interests of humanity, and revocable at any moment for sufficient reasons of war. The attitude of the French government is less clear. Napoleon no doubt complained that the seizure of fishing-boats was 'contrary to all the usages of civilised nations, but as his declaration was made after the English government had begun to capture them on the ground that they were being used for warlike purposes, it is valueless as an expression of a settled French policy; it was merely one of those utterances of generous sentiment with which he was not unaccustomed to clothe bad faith. At a later time during the wars of the Empire the coast fisheries were left in peace. The United States followed the same practice in the Mexican war; and France in the Crimean, Austrian, and German wars prohibited the capture of fishing-vessels for other than military and naval reasons.

"In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing-vessels so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption. It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardship on their owners, is as a measure of general application wholly ineffective against the hostile state. But it must at the same time be recognised that fishing-boats are sometimes of great military use. It cannot be expected that a belligerent, if he finds that they have been employed by his enemy, will not protect himself against further damage by seizing all upon which he can

lay his hands; nor that he will respect them under circumstances which render their employment probable. The order to capture French fishing-boats given by the British government in 1800 was caused by the use of some as fire-vessels against the English squadron at Flushing, and of others with their crews to assist in fitting out a fleet at Brest; and it was intended that between 500 and 600 should form part of the flotilla destined for the invasion of England. They had before this time been largely used as privateers to prey upon British commerce in the Channel; and they continued to be so used. They lay about, apparently fishing, with most of their crews concealed; at night or in thick weather they drew alongside merchantmen, which were easily boarded and captured by surprise. Any immunity which is extended to objects on the ground of humanity or of their own innocuousness, must be subject to the condition that they shall not be suddenly converted into noxious objects at the convenience of the belligerent; and it is not probable that states will consent to forego the advantages which they may derive from the use of their fishing-vessels in contingencies which cannot always be foreseen.

"It has never been contended, except by the French at the beginning of the present century, that vessels engaged in deep-sea fishing are exempt from capture."

Hall, pp. 467, 469.

"Small craft engaged exclusively in coast fisheries or in the petty transactions of local trade were exempted from belligerent capture along with their appliances, rigging, tackle, and cargo by the third article of the eleventh Hague Convention of 1907. But 'this exemption no longer applies from the moment that they take any part whatever in hostilities.' And further, 'the contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.' The Convention safeguards and enlarges an immunity which had grown up by custom extending back to mediaeval times. In 1798 Sir W. Scott decided in the case of the *Young Jacob* and *Johanna*[1] that it was a rule of comity only, while a few years afterwards the French Government maintained that it was an obligatory rule of law. Whichever view may have been correct more than a century ago, there can be no doubt that the latter has now prevailed. Deep-sea fishing vessels may be captured like other ships of the enemy; but inshore fishermen are allowed to pursue their avocation unmolested on condition of refraining from hostilities, and this privilege of theirs has been extended to boatmen engaged in petty local trade along the coast. If, however, the new plan of fitting trawlers with sweeps for mines is continued, in all probability the immunity will not long survive. Meanwhile the exact force of some of the expressions employed in the Convention may be matter of doubt. The question has been raised whether by the words of the third article the offenders forfeit nothing but their own immunity in case of a hostile act, or whether all boats of a like kind belonging to the same belligerent are thereby rendered liable to capture. The better opinion seems to be that none but boats that have

[1] 1 C. Rob., 20.

themselves violated the Convention may be subjected under it to the severities of warfare. But this view does not exclude the possibility of a general attack on all fishing boats by way of reprisal, if the wrong-doing takes place on a large scale and is continued in spite of remonstrances. Moreover, it seems certain that the coast referred to in the phrase 'coast fisheries' need not be the coast of the fishermen's own country, but any coast where they have a legal right to fish. On the other hand it is understood that coasting steamers are not reckoned among small boats employed in local trade, and therefore receive no protection under the Convention."

Lawrence, pp. 454, 455.

"Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as in the opinion of the hostile government or its naval commanders concerned they are not likely to be engaged in any warlike employment. If the opinion here referred to is only that of the naval commanders concerned, the prize court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a government order, the prize court, in the absence of any thing to the contrary in the constitution of the country, will be bound by such an order as emanating from the authority under which it sits. To this statement, which appears to be sufficient as regards the duties of prize courts and commanders, it must be added that a government is not entitled to issue orders interfering with the coast fisheries of its enemy state, unless as an inseparable part of a military operation, or when it has good reason to expect that that state will make a warlike use of the men or boats. * * *

"The coast fisheries which enjoy the immunity thus described are contrasted with what is called the great fishery, such as that for cod, right or sperm whale, seal or sea calf; indeed England, in the correspondence carried on with the French government * * * declared, with regard to the order in council of 16 March 1801, that the concession was never extended to the great fishery or to commerce in oysters or in fish. On the other hand it is not limited to vessels fishing off the coast of their own country, for the Spanish boat *Lola*, which was declared by the Supreme Court of the United States[1] to be entitled to it, had been fishing on the coast of Yucatan. The condition that the fish must be brought to market alive appears to supply the necessary distinction. * * *

"Another historical fact calls for an accurate appreciation of the rule, which, as I have stated it, is not one for a general immunity of coast fisheries, but for their immunity from capture on the ground of enemy character, and therefore does not entitle them to stand in the way of and prevent or frustrate a military operation, which is

[1] 175 U. S., 677.

what private property on land is not allowed to do. Their want of immunity for breach of blockade, for which we have seen authority from a source generally favourable to them, is a particular instance of that principle. The fact to which we refer is what took place in the sea of Azof during the Crimean war, when the instructions of the British admiral were 'to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighbouring population, and indeed of all things destined to contribute to the maintenance of the enemy's army in the Crimea.' Thereupon the British and French ships in cooperation 'destroyed large fishing establishments and storehouses of the Russian government, numbers of heavy launches, and enormous quantities of nets and gear, salted fish, corn and other provisions intended for the supply of the Russian army.' It may well be believed that private property of fishermen was involved in such an operation, and that it would have been impossible to carry the instructions into effect, purely military as their purport was, consistently with the scrupulous sparing of private property. The French instructions to naval commanders, as well during the wars of 1859 and 1870 as during the Crimean war, forbade them to trouble the coast fisheries or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary. Those of 1854 required the commanders, in case of operations in the White Sea, to spare the trade in fresh fish, provisions, utensils and fishing tackle between the country people of the Russian coast and the Norwegian fishermen from Finmark, except in case of abuse.

"We can now deal with the question whether the immunity of coast fisheries is a rule of international law, properly so called. The answer depends in part on the meaning with which the word 'law' is used in the question, and in part on the terms in which the immunity is stated. If stated too largely it is either not a rule of law, in any sense, or it is one subject to that violation from necessity which, as I so often urge, is to my thinking the negation of legal principle. If stated as I have stated it, it appears to have arrived in the course of centuries at satisfying the conditions which we regard as those of international law in the only true sense, namely that the conscience of our international society demands it and that it is observed."

Westlake, vol. 2, pp. 155–159.

With particular regard to Article 3, H XI, 1907, Westlake (vol. 2, p. 160) says:

"It may be assumed, when it is said that the exemption of coast fishing boats ceases as soon as they participate in hostilities, that this does not mean that no particular boat can lose the immunity without having itself so participated, but that the immunity may be withdrawn from the class on any part of the enemy's coast, when he there employs them or the fishermen with a warlike purpose."

During the blockade of Cuba in 1898, the commander in chief of the American fleet informed the Navy Department "that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging to the maritime

inscription of Spain, who have already served in the Spanish navy, and who are liable to further service." He recommended that these seamen be detained as prisoners of war.

The Navy Department sent the following response to this recommendation: "Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained."

Naval Operations of the War with Spain, p. 178.

In British Order of Council dated May 23, 1806, it was ordered "that all Fishing Vessels under Prussian and other colors, and engaged for the purpose of catching fish, and conveying them fresh to market, with their crews, cargoes, and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested."

Art. 36 of Holland's Naval Prize Law provides that "boats engaged in coast fisheries" are "usually exempt from detention * * * though only under special instructions."

Holland cites the *Young Jacob* and *Joanna*, 1 C. Rob., 20.

"ART. 14. All merchant vessels of the enemy, except coast fishing vessels innocently employed, are subject to capture, unless exempt by treaty stipulations."

United States Naval Code, 1900.

"ART. 35. All vessels belonging to the enemy are liable to capture. The ships, however, enumerated below shall be exempted from capture, if it is clear that they are employed exclusively in the enterprises or duties for which they were intended:—

"1. Coasting fishing vessels. * * *"

Japanese Regulations, 1904.

"6. Exempt from seizure are:—

* * * * * * *

(b) Vessels engaged exclusively in the coast fisheries, or in the service of local shipping traffic, so long as they take no part whatever in hostilities. (Convention XI, 2d Hague Conference.)"[1]

German Prize Rules, 1909.

"12. Any enemy vessels used exclusively for fishing along the coast or for local trade are exempt from capture as well as their engines, appliances, rigging, tackle and cargo. This exemption ceases to be applicable to them as soon as they participate in any way whatever in the hostilities."

"13. Nevertheless you will not tolerate fishing and local navigation along the coast of the enemy except during the day and so far as this favor, dictated by a humane interest, does not lead to any abuse prejudicial to military and naval operations, especially blockade."

"14. Every vessel previously warned of the prohibitions that you shall thus decide upon, or proceeding from a port to which you have given notice of these prohibitions, and which does not observe them, shall be considered by you as participating in the hostilities."

[1] "This exemption is not enjoyed by China, Montenegro, and Russia for the ships and vessels concerned of their flags."

"16. You are forbidden to profit by the inoffensive character of French vessels of the character above referred to by employing them for a military purpose while preserving their peaceful appearance."

French Naval Regulations, 1912.

Article 3, Hague XI. 1907, substantially appears as Art. 27 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913, Art. 27 in addition provides that this exemption shall extend to vessels engaged "in the service of small local navigation."

Sir William Scott, in the *Young Jacob* and *Johanna* (1798) (1 C. Rob. 20), said: "In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade."

In the *Julia* (1814) (8 Cranch, 181), the Court said: "An allusion has been made to the passports or safe-conducts granted, in former times, to the fishing-vessels of enemies; and it has been argued, that such passports or safe-conducts have never been supposed to induce the penalty of confiscation. This will at once be conceded, as to the belligerent nation who granted these indulgencies; but as to the other nation, where such passports were not guaranteed by treaty or mutual pacts, I have no authority to lead me to an accurate decision. The French ordinance of 1543 authorized the admiral to make fishing truces with the enemy; and where no such truces were made, to deliver to the subjects of the enemy, safe-conducts for fishing, upon the same stipulations as they should be delivered to French subjects by the enemy. This, therefore, was an authority to be exercised only in cases of reciprocity; and it seems to have been abolished, from the manifest inconveniences, which attended the practice. Valin, sur ord. lib. 1, p. 689, 690."

In the case of the *Empress* (1862) (Blatch. P. C. 128), an enemy fishing vessel, the court said:

"The vessel having left the port of New Orleans after that port was blockaded, with intent to catch a cargo of fish, and return with it to that port, for a market, and being herself enemy property, seized at sea, was subject to condemnation and forfeiture, and judgment to that effect must be accordingly ordered."

In the case of the *Advocate* (1862) (Blatch., P. C. 142), an enemy vessel, under an enemy flag, with an enemy fishing license, was captured, while engaged in fishing. She had no cargo on board other than fish that were to be delivered in New Orleans, a port under blockade at the time. Held that she was a good prize.

In the opinion of the Supreme Court of the United States (1900) (175 U. S. 677), in the case of the *Paquette Habana* and the *Lola*, will be found an exhaustive survey of the history of the exemption of coast fishing vessels from capture in times of war. This case

involved the capture, during the Spanish-American war in 1898, of two small coast fishing boats, each flying the Spanish flag, each manned by a crew of Cubans, and each commanded by a Spanish subject living in Habana. The *Paquette Habana* had been fishing off the western coast of Cuba and was captured on her return trip to Habana with a cargo of live fish. The *Lola* had been fishing in Campeachy Sound off the coast of Yucatan, and was captured on her return trip with a cargo of live fish off Bahia Honda. Each vessel was condemned as good prize in the United States District Court for the Southern District of Florida.

In reversing this decree, the Supreme Court, after an elaborate review of the history of the exemption of coast fishing vessels, said:

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

"The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

"Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

"This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter. * * *

"Each vessel was of a moderate size, such as is not unusual in coast fishing smacks, and was regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan Channel and fished on the coast of Yucatan, we can not doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law."

In the case of the *Michael* (2 Rus.-Jap. P. C., p. 80), the Japanese Prize Court held at Sasebo found the Russian Steam Ship *Michael*, a deep-sea fishing steamer of the Pacific Whaling and Fishing Company, a good prize, for the reason among others that "the usage of International Law by which small coastal fishing boats are not cap-

tured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle cannot be extended to a vessel like the *Michael*, which was the property of a company, and engaged in deep-sea fishing."

This decision was sustained by the Higher Prize Courts on appeal, on other grounds however.

In the *Alexander* (2 Rus. Jap. P. C. p. 86) it was likewise held that a deep-sea fishing vessel was not exempt from capture and condemnation.

Vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture.—*Article 4, Hague, XI, 1907.*

"ARTICLE 46. *Vessels charged with missions.*—Vessels charged with religious, scientific, or philanthropic missions are exempt from seizure."

Institute (1913), p. 185.

"ARTICLE 49. *Suspension of immunities.*—The exceptions considered in Articles * * * 46 * * * cease to be applicable if the vessels to which they refer participate in the hostilities in any manner whatsoever or commit other acts which are forbidden to neutrals as unneutral service.

"The same suspension occurs if, summoned to stop to submit to search, they seek to escape by force or by flight."

Institute (1913), p. 186.

"ARTICLE 59. Members of the personnel of an enemy ship which, because of its special character, is itself exempt from seizure, cannot be held as enemies."

Institute (1913), p. 189.

"So it is the practice of all civilized nations to consider vessels employed only for the purpose of discovery and science, as excluded from the operations of war."

Kent, vol. 1, p. 100 (note).

"Vessels of *discovery*, or of expeditions of exploration and survey, sent for the examination of unknown seas, islands, and coasts, are, by general consent, exempt from the contingencies of war, and therefore not liable to capture. Like the sacred vessel which the Athenians sent with their annual offerings to the temple of Delos, they are respected by all nations, because their labors are intended for the benefit of all mankind. Thus, when Captain Cook sailed from Plymouth, in 1776, in the ship *Resolution*, accompanied by the *Discovery*, M. de Sartine, the French minister of marine, dispatched a letter to the admiralties and chambers of commerce throughout the kingdom, to be communicated to the owners and captains of vessels cruising as privateers or otherwise, directing them, in case they met at sea, to treat him and his vessels as neutrals and friends, provided that he, on his side, abstained from all hostility. This praiseworthy example has since been followed by all civilized powers toward vessels similarly employed. It is, however, usual and proper for the government sending out such expeditions, to give formal notice to other powers, describing the character and object of the expedition, the number of vessels employed, the nature of their armament, etc.,

in order that they may issue the proper instructions to their own vessels on the high seas. Such expeditions must confine themselves most strictly to the object in view; if they commit any act of hostility they forfeit their exemption from capture."

Halleck, p. 492.

Shipwrecks and Vessels in Distress.

"Some have contended that the rule of exemption ought to extend to cases of shipwreck on a belligerent coast, to cases of forced refuge in a belligerent harbor by stress of weather, or want of provisions, and even to cases of entering such ports from ignorance of the war. There are exceptional cases where such exemption has been granted. Thus, when the English man-of-war the *Elizabeth* had been forced by stress of weather, in 1746, to take refuge in the belligerent port of Havana, the captain offered to surrender himself to the Spanish governor as prisoner, and his vessel as a prize, but the latter refused to take advantage of his distress; on the contrary, he offered him every facility for repairing his vessel, and, on leaving, gave him a safe conduct as far as the Bermudas. Again, in 1780, an English captain entered the Spanish port of San Fernando de Omoa, in Honduras, without knowing that it was belligerent. The Spanish commandant refused to take advantage of his ignorance, but permitted him to provision his ship and to sail unmolested to Jamaica. On the other hand, the French squadron which entered Louisburg, in the Island of Cape Breton, in 1745, ignorant of its hostile character, was captured as prizes, and its officers and crews retained as prisoners of war. The French captain Nalin, entered the port of Granada, in the Antilles, in the war of 1780, ignorant of its hostile character. He was immediately seized as prisoner of war, and his vessel as a good prize. In 1799 a Prussian vessel, *La Diana*, forced to take refuge in the port of Dunkirk, was restored by the French tribunal on the principle of *res sacra miser;* but in the analogous case of *Maria Arendz*, in 1800, the court condemned, in strict conformity with the French ordonnances. A court may be compelled by a sense of duty to condemn in such cases, but the sovereign power of the state might well exercise its sense of humanity and generosity by restoring even after condemnation. Notwithstanding the plea raised by French writers in such cases that 'le malaheur opère de plein droit une trève,' the principle is neither admitted by the general law of nations nor by the maritime ordonnances of France."

Halleck, p. 494.

"Vessels employed in scientific expeditions and those shipwrecked upon the enemy's coast, are usually * * * exempt from capture."

Woolsey, p. 304.

"Vessels engaged in exploration or scientific discovery are granted immunity from capture. The usage began in the last century when Bougainville and La Pérouse appear to have been furnished with safe conducts to protect them in the event of war breaking out during their voyage, and the French government in 1776 ordered all men of war and privateers to treat Captain Cook as a neutral so long as he abstained from acts of hostility. During the present century there have been several occasions on which there has been reason for

behaving in a like manner, and on which accordingly vessels have been furnished with protection. The most recent of these was the despatch of the Austrian corvette *Norvara* on a scientific expedition in 1859."

Hall, pp. 440, 441.

The exemption of this class of vessels "from capture was originally established by a usage extending back to the middle of the eighteenth century," but it now rests on Article 4 of the Hague Convention eleven of 1907. "A corresponding obligation to refrain from taking any part in hostilities is laid on the protected vessel. Obviously this is of the essence of the arrangement, and, therefore, though it is not expressly mentioned in the Convention, it must be understood as still subsisting. This cannot be said of the other customary duty of obtaining a pass from the enemy's government. It can hardly be regarded as essential, but is rather of the nature of an extraneous safeguard. And the silence of the Convention with regard to it was meant to be taken as signifying that it is no longer obligatory. The point is important; for the case of Commander Flinders shows what unpleasant possibilities lurk in ambiguity. He was engaged in Australian exploration during the early years of the nineteenth century, in the midst of the long war with Revolutionary and Napoleonic France. Before he sailed from England he had obtained a passport from the French Minister of Marine, and during his voyage he had scrupulously obeyed his instructions to 'act in all respects towards French ships as if the two countries were not at war.' Yet when in 1803 he put into Port Louis in Mauritius, then a French colony, his ship was detained, and he and his crew were made prisoners of war. It seems that at Sydney his original vessel, the *Investigator*, had been found to be rotten and unseaworthy, and he had exchanged her for the *Cumberland*, which was placed at his disposal by the Governor of New South Wales. The French authorities at Mauritius detained the vessel and all within her, on the ground that she was not the ship to which a passport had been given, and that there were suspicious circumstances connected with her entry into Port Louis. Flinders remained in captivity till he was released on parole in 1810, and the *Cumberland* was retaken when Mauritius capitulated to the British in the same year. The case shows the need of extreme care in carrying into effect arrangements between belligerent powers."

Lawrence, p. 452.

Books and Works of Art for Public Institutions.

"In all probability *books and works of art in course of conveyance to some public institution in the enemy's territory* would now be regarded as exempt by usage from confiscation. In the case of the *Marquis de Somarveles* the British Vice-Admiralty Court of Halifax in Nova Scotia restored in 1812 to the Academy of Arts in Philadelphia a cargo of paintings and prints captured on their voyage from Italy to the United States. This decision has often been mentioned with approval, and seems to have been followed during the American Civil War. Article 56 of the Hague Code for Land Warfare exempts from seizure by troops the property of institutions dedicated to art and science; and there can be little doubt that a prize court of to-day

would extend the exemption by analogy to property found at sea, especially as there are the precedents we have mentioned ready to be quoted in support of such a decision."

Lawrence, p. 462.

"Expeditions despatched for purposes of science, religion or humanity have long enjoyed an immunity from interference on the ground of enemy character, so long as they observe all the duties of neutrality and engage in no commerce not necessary for the object of the expedition. This is now secured them by Article 4 of Hague eleven, 1907. When starting for localities where communication with the civilised world may be for long impossible, they have often been furnished by friendly governments with safe-conducts in advance, as in the cases of Bougainville in 1766, La Pérouse in 1785, the expeditions in search of Sir John Franklin, and that of Nordenskiöld in the *Vega*. The latter examples show that the privilege is not confined to public expeditions, but full information would be required by any government asked for a safe-conduct, and any departure from the particulars so communicated might entail serious consequences by reason of suspicions excited."

Westlake, vol. 2, pp. 160, 161.

Works of Art or Learning.

Works of art or learning belonging to a state or to public institutions are protected from capture on land by H LVI. "They had already been pronounced exempt from maritime capture by two remarkable judgments. One was that of the vice-admiralty court of Nova Scotia restoring paintings and engravings, taken by a British ship in 1813, to the Academy of Arts at Philadelphia;[1] the other was that of the United States court in 1861,[2] restoring cases of books to a university in the insurgent state of North Carolina. Works of art or learning belonging to private individuals enjoy no immunity. The concession is made to the public ends promoted by the body which profits by it."

Westlake, vol. 2, p. 161.

"36. Ships engaged exclusively on a voyage of Scientific Discovery are usually exempt from Detention. * * *"

Naval Prize Law, Holland.

"ART. 13. All public vessels of the enemy are subject to capture, except those engaged in purely charitable or scientific pursuits, in voyages of discovery, or as hospital ships under the regulations hereinafter mentioned."

United States Naval Code, 1900.

ARTICLE 35, Japanese Regulations relating to Capture at Sea, 1904, provides that there shall be "exempted from capture, if it is clear that they are employed exclusively in the enterprises or duties for which they were intended:— * * *

"2. Ships sailing for scientific, charitable, or religious purposes.

"3. Vessels used for lighthouse purposes. * * *"

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[1] The *Marquis de Somarveles*, Stewart Adm. (Nova Scotia), 445, 482.
[2] The *Amelia*, 4 Philadelphia, 417.

"6. Exempt from seizure are:—

* * * * * * *

(c) vessels engaged in religious, scientific, and benevolent work (Convention XI, 2d Hague Conference).[1]"

German Prize Rules, 1909.

"15. Vessels charged with religious, scientific or philanthropic missions are likewise exempt from capture, subject to the same condition that these vessels do not take part in any way in the hostilities."

"16. You are forbidden to profit by the inoffensive character of French vessels of the character above referred to by employing them for a military purpose while preserving their peaceful appearance."

French Naval Regulations, 1912.

Article 4, Hague XI, 1907, substantially appears as Art. 28 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the case of The *Amelia* (1861) (4 Phila. 417, 1 Fed. Cases No. 277), the court released certain books consigned to the University of North Carolina in care of a resident of Charleston, S. C. It was said: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question, gives it a different character. The United States * * * are compelled incidentally [to the war] to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory. The case of the pictures of the Philadelphia Academy of Fine Arts [The *Marquis de Somarveles*, Stewart Adm., Nova Scotia, 445], liberated by a British colonial prize court in the war of 1812, the prior proceedings in France mentioned in the report of that case, and the French and other decisions upon cases of fishing vessels, are precedents for the decree" releasing the books in this case.

In the case of the *Manchuria* (No. 1) (1905) (2 Rus.-Jap. P. C., p. 52), certain goods on board a captured enemy vessel, consigned to the Danish Lutheran Church at Port Arthur, and to a Danish missionary temporarily living in enemy territory, were released by the Japanese Prize Court at Sasebo.

"[1] This exemption is not enjoyed by China, Montenegro, and Russia for the ships and vessels concerned of their flags."

Enemy vessels actually engaged in Cartel service are exempt from Detention, and this alike when they actually have prisoners on board and when they are empty, whether going to fetch prisoners or returning after having delivered them.[1]

Art. 32, Naval Prize Law, Holland.

"ARTICLE 45. *Cartel ships.* Ships called cartel ships, which act as bearers of a flag of truce, may not be seized while fulfilling their mission, even if they belong to the navy.

"A ship authorized by one of the belligerents to enter into a parley with the other and carrying a white flag is considered a cartel ship.

"The commanding officer to whom a cartel ship is sent is not obliged to receive it under all circumstances. He can take all measures necessary to prevent the cartel ship from profiting by its mission to obtain information. In case it abuses its privileges, he has the right to hold the cartel ship temporarily.

"A cartel ship loses its rights of inviolability if it is proved, positively and unexceptionably, that the commander has profited by the privileged position of his vessel to provoke or to commit a treacherous act."

"ARTICLE 49. *Suspension of immunities.* The exceptions considered in Articles * * * 45 * * * cease to be applicable if the vessels to which they refer participate in the hostilities in any manner whatsoever or commit other acts which are forbidden to neutrals as unneutral service.

"The same suspension occurs if, summoned to stop to submit to search, they seek to escape by force or by flight."

Insitute (1913), p. 185, 186.

"ARTICLE 65. D. *Parlementaires.* The personnel of cartel ships is inviolable.

"It loses its rights of inviolability if it is proved in a clear and incontestable manner that it has taken advantage of its privileged position to provoke or commit an act of treachery."

Institute (1913), p. 191.

The interdiction of trade between belligerents "applies to ships of truce, or cartel ships, which are a species of navigation intended for the recovery of the liberty of prisoners of war. Such a special and limited intercourse is dictated by policy and humanity, and it is indispensable that it be conducted with the most exact and exclusive attention to the original purpose, as being the only condition upon which the intercourse can be tolerated. All trade, therefore, by means of such vessels, is unlawful, without the express consent of both the governments concerned."

Kent, vol. 1, p. 79.

[1] *Daiffie,* 3 C. Rob. 139. *La Gloire,* 5 C. Rob. 192.

"A *cartel ship*, is a vessel commissioned for the exchange or ransom of prisoners of war, or to carry proposals from one belligerent to the other, under a flag of truce. Such commission and flag are considered to throw over the vessel, and the persons engaged in her navigation, the mantle of peace; she is, *pro hoc vice*, a neutral licensed vessel, and her crew are also neutrals; and so far as relates to the particular service in which she is employed, she is under the protection of both belligerents. But she can carry no cargo, and no ammunition or implements of war, except a single gun for firing signals. This is regarded as a species of navigation which, on every consideration of humanity and policy, should be conducted with the strictest regard to the original purpose, and to the rules which are built upon it, since, if this mode of intercourse be broken off, it will be followed by calamitous results to individuals of both belligerents. It is, therefore, said by high authority, that cartel ships cannot be too narrowly watched; and that both parties should take care that the service should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. The authority to commission a cartel ship, is supposed to emanate from the supreme power of the state, but it may be issued by a subordinate officer, in the due execution of a public duty. When a cartel ship appears to have been employed in the public service, and for the purposes of humanity, it will be presumed that the commission under which she acts was issued by the sanction of the councils of the state, until renounced by the sovereignty from which it is supposed to emanate. Thus, a cartel, granted by the commander of the British forces, at Amboyna, to a Dutch vessel, was held by Sir William Scott[1] to be valid for the protection of the vessel from capture and condemnation. * * *

"The rights, immunities and duties of cartel ships, have been matters of discussion and judicial decision in prize courts. Sir William Scott gave a very elaborate opinion on this subject, in the case of *The Daifjie*.[2] With respect to the character of the ships employed in such service, he says it is generally immaterial whether they are merchant ships, or ships of war, but there may be extreme cases in which the nature of the ship might be material; 'as, if a fire ship was to be sent on such service to Portsmouth or Plymouth, though she had prisoners on board, she would undoubtedly be an unwelcome visitor to a naval arsenal, and her particular character might fairly justify a refusal to admit her.' He was also of opinion, that the cartel protected such ships, not only *in trajectu*, *adeundum et redeundum*, but also in going from one port to another to be fitted up and to take prisoners on board, although the passage of ships from one port to another of an enemy, is liable to suspicion. Moreover, that a vessel *going* to be employed as a cartel ship, is not protected, by mere intention, on her way, for the purpose of taking on herself that character when she arrives. When it is necessary to send to another port for vessels for such purpose, it is proper to apply to the enemy's commissary of prisoners for a pass or special safe conduct. The principal question to be decided in such cases, is that of intention; if the vessel is actually commissioned and employed as a cartel ship, if she is fitted out and conducts herself, in every

[1] The *Carolina*, 6 C. Rob., 336. [2] 3 C. Rob., 141.

respect, as a cartel ship, she is protected as such; but if she is acting fraudulently, she is liable to condemnation. Imprudence and negligence, do not constitute fraud. * * *"

Halleck, pp. 667, 668.

A cartel ship is "subjected to few rules calculated to secure that" she "shall be used in good faith." She "sails under a safe-conduct given by an officer called a commissary of prisoners, who lives in the country of the enemy, and she is protected from capture or molestation, both when she has prisoners on board, and when she is upon a voyage to fetch prisoners of her own country or is returning from handing over those belonging to the enemy. This protection does not extend to a voyage undertaken from one port to another within the territory of the cartel ship for the purpose of taking prisoners on board at the latter place for conveyance to the hostile territory; and it is lost if she departs from the strict line of the special purpose for which she is used, or gives reason to suspect that she intends to do so. Thus she may not carry merchandise or passengers for hire, a fraudulent use must not be made of her to acquire information or to convey persons noxious to the enemy, and she must not be in a condition to exercise hostilities."

Hall, p. 571.

Cartel ships "are vessels employed in services connected with the exchange of prisoners of war. Each of them should carry a permit emanating from the supreme government of the enemy state, authorizing her to pursue her humane mission without molestation. In the case of the *Carolina* (1 C. Rob. 336) Sir W. Scott decided that a subordinate authority might issue such a protection; and in the case of the *Daifjie* (3 C. Rob. 140) he laid down that to enjoy the benefit of it the cartel-ship need not have prisoners actually on board. She is protected from capture on both the outward and the return voyage, and even when she has done no more than enter on her functions by being put in a state of preparation to perform them. But the mere intention to become a cartel-ship will not be sufficient; and a vessel on her way from one port to another of her own country for the purpose of taking on herself that character may be captured, unless she has obtained a pass from a commissary of prisoners, who is an official of one belligerent residing in the country of the other in order to carry out the arrangements connected with exchange. Belligerents may employ either public or private vessels in their cartel service; but the carriage of merchandise, despatches, or passengers is strictly forbidden, and also the performance of any hostile acts, or even the taking on board of the means to perform them in the shape of armament. The law of the matter rests solely on usage as interpreted by prize court decisions, and is at present of little importance owing to the disuse of exchange in recent wars. But the practice may be revived at any time, and therefore it cannot be passed over unnoticed."

Lawrence, p. 453.

"Cartel ships are vessels of belligerents which are commissioned for the carriage by sea of exchanged prisoners from the enemy country to their own country, or for the carriage of official com-

munications to and from the enemy. Custom has sanctioned the following rules regarding these cartel ships for the purpose of securing protection for them on the one hand, and, on the other, their exclusive employment as a means for the exchange of prisoners: Cartel ships must not do any trade or carry any cargo or despatches; they are especially not allowed to carry ammunition or instruments of war, except one gun for firing signals. They have to be furnished with a document from an official belonging to the home State of the prisoners and stationed in the country of the enemy declaring that they are commissioned as cartel ships. They are under the protection of both belligerents and may neither be seized nor appropriated. They enjoy this protection not only when actually carrying exchanged prisoners or official communications, but also on their way home after such carriage and on their way to fetch prisoners or official communications. They lose the protection at once, and may consequently be seized and eventually be appropriated, in case they do not comply, either with the general rules regarding cartel ships, or with the special conditions imposed upon them."

Oppenheim, vol. 2, p. 283.

"*Cartel ships*, as those are called which are employed in the exchange of prisoners or on other special services under agreement between the belligerents, are licensed for themselves and any merchandise which they carry by express permission, but not for any goods carried in excess of the permission. And if the permission is grossly exceeded, the ship herself will be confiscated. All contracts entered into for equipping and fitting a cartel ship for her service are considered as made between friends, and may be enforced in the courts of either belligerent having jurisdiction in the case."

Westlake, vol. 2, p. 162.

"ART. 33. Cartel vessels ought to be furnished with a Pass from a Commissary of Prisoners in the country of one of the Belligerents; but the Commander should not detain a Vessel, though not furnished with such a Pass, if there is substantial evidence of any kind that she is *bonâ fide* actually being employed as a Cartel Vessel."[1]

Naval Prize Law, Holland.

"ART. 34. The fact that a Vessel sails under a Flag of Truce or under the Flags of both Belligerents at the same time will not alone be sufficient evidence that she is being employed as a Cartel Vessel.[1] A vessel professedly going to seek employment in the Cartel service, but navigated by the Master on his own responsibility, without a Pass from a Commissary of Prisoners, is not entitled to be considered a Cartel Vessel."[2]

Naval Prize Law, Holland.

"ART. 35. Cartel Vessels are not at liberty to traffic or to carry any cargo whatever or Despatches; if they do, they are liable to Detention."[3]

Naval Prize Law, Holland.

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[1] *La Gloire*, 5 C. Rob., 198.
[2] *Daifjie*, 3 C. Rob., 142.
[3] *La Rosine*, 2 C. Rob., 372. *Venus*, 4 C. Rob., 355.

"ART. 13. * * * Cartel and other vessels of the enemy, furnished with a proper safe-conduct, are exempt from capture, unless engaged in trade or belligerent operations."

United States Naval Code, 1900.

ARTICLE 35, Japanese Regulations relating to Capture at Sea, 1904, provides that there shall be "exempted from capture, if it is clear that they are employed exclusively in the enterprises or duties for which they were intended:— * * *

"4. Vessels employed in connection with the exchange of prisoners."

"6. Exempt from seizure are:—

* * * * * * *

(d) Vessels whose voyage is made for carrying a flag of truce, or for the exchange of prisoners."

German Prize Rules, 1909.

In the case of the *Venus* (1803) (4 C. Rob. 355), a cartel ship discharged her prisoners, and then, instead of returning to her port, proceeded to engage on a trading voyage. While so engaged she was captured and condemned as good prize. Sir William Scott, in delivering the judgment in this case, said:—"The service on which they [cartel ships] are sent, is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care, that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. It is not a question of gain, but one on which depends the recovery of the liberty of individuals who may happen to have become prisoners of war; it is, therefore, a species of navigation which, on every consideration of humanity and policy, must be conducted with the most exact attention to the original purpose, and to the rules which have been built upon it, since, if such a mode of intercourse is broken off, it cannot but be followed by consequences extremely calamitous to individuals of both countries.

"Cartel ships are subject to a double obligation, to both countries, not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country; both countries are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must, therefore, be held to be prohibited, and it is not without the consent of both governments, that vessels engaged on that service can be permitted to take in any goods whatever."

In this case the learned judge observed that, "at the same time, I will not say that, if the master had taken on board a few articles for his own petty profit, such an act should, in all cases, subject the property of the owner of considerable value to confiscation.

The *Mary* (1804) (5 C. Rob. 200) was an English merchant vessel captured by the Dutch at Cape of Good Hope. Her crew were made prisoners of war and placed on board an English cartel ship for transportation to England, there to be exchanged for Dutch prisoners. After remaining on board the cartel ship for a short time, these men by a surprise attack recaptured the *Mary* and took her to

St. Helena from which place she was sent to England for adjudication before the prize court. In the prize court the crew put in a claim for salvage for the recapturing of their vessel. This claim was disallowed on the ground that the recapture by them was an invalid act and "in violation of the duties which they had stipulated for" as cartel prisoners. In discussing those duties, Sir William Scott said that the men "were bound, by their own engagement, as strongly as men could be, to abstain from all acts of violence, and to do nothing which had the least connection with hostility."

In the *Carolina* (1807) (6 C. Rob. 336), the Court said: "The privileges and immunities of cartel ships are of a very sacred nature, and are to be received with great respect, inasmuch as they tend very beneficially to mitigate the miseries of war and to facilitate the return of peace, by the removal of these obstructions, which put a stop to the intercourse of nations. With respect to the general character of contracts of this description, I am disposed to hold, that the actual existence of a war is not essentially necessary to give effect to them, but that it will be sufficient, if they are entered into prospectively, and in expectation of approaching war. Because the occasions for them may just as naturally arise from a view of approaching events; parties may contract to guard against the consequences of hostilities which they may foresee; and in this instance it is manifest that such apprehensions, which were very general, have been fully justified, by the course of events that have ensued."

In this case it was held that an officer of the Crown in India, who was likewise an officer of the East India Company, could enter into a valid cartel agreement, and further that articles purchased for trade by the ship on her return trip were good prize.

The *Rose in Bloom* (1811) (1 Dod. 57), a ship flying the American flag, was captured on a voyage fro mthe blockaded port of Bayonne to New York. She had on board as passengers certain "distress American seamen" that were being conveyed to the United States. She also had a small cargo of merchandise.

In holding this vessel to be good prize by reason of the fact that she was engaged in trade with the enemy, Sir William Scott said: "If this ship had been employed by the American chargé des affaires for the sole purpose of taking home these poor men, it would, I think, have been entitled to a very favorable consideration. Had the transaction confined itself within these limits, the present case might reasonably have been considered to form an exception to the general rule. It is, however, highly requisite, that the existence and contents of any such contract should be fully established in evidence. * * *

"The counsel for the claimants have * * * described this as a cartel ship; but I think the term is not strictly applicable to a neutral vessel engaged in the species of service for which this ship is said to have been taken up by the American minister. The employment to which the privilege of a cartel is allowed is of a very particular nature. It is a mode of intercourse between hostile nations, invented for the purpose of alleviating, in some degree, the calamities of war, by restoring to their liberty those individuals who may happen to have fallen into a state of captivity. It is for the mutual exchange of prisoners of war; and, therefore properly speaking, it

can take place between belligerents only. But the employment of this vessel is in a service of a different description. It is the transaction of a neutral state, acting for its own purposes, without reference to the existence of a war with any other country. It can never be treated as a general rule, that a vessel so employed would be protected on a voyage otherwise illegal."

In the case of Crawford *v.* The *William Penn* (1815) (1 Pet. C. C. 106, 6 Fed. Cases No. 3372), the libellants, alien enemies, set up a claim for certain advances made by them to enable a cartel ship to carry American prisoners from Jamaica to the United States. In holding that such a libel could be maintained, Mr. Justice Washington describes the duties and responsibilities of a cartel ship in the following words: "What is the character of a cartel ship and of the persons concerned in her navigation? The flag of truce which she carries, throws over her and then the mantle of peace. She is, *pro hac vice*, a neutral licensed vessel; and all persons concerned in her navigation, upon the particular service in which both belligerents have employed her, are neutral, in respect to both, and under the protection of both. She cannot carry on commerce under the protection of her flag, because this was not the business for which she was employed, and for which the immunities of that flag were granted to her. She is engaged in a special service, to carry prisoners from one place to another; and, whilst so engaged, she is under the protection of both belligerents, in relation to every act necessarily connected with that service. It follows, that all contracts made for equipping and fitting her for this service, are to be considered as contracts made between friends, and consequently ought to be enforced in the tribunals of either belligerents, having jurisdiction of the subject. The agreement of the two nations, by their agents, to make her a cartel amounts to a license by both, to perform the service in which she is employed, and sanctifies all the means necessary to that end."

The captain, officers, and members of the crew [of a captured enemy merchant ship], when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.—*Article 6, Hague XI, 1907.*

"ARTICLE 11. *Belligerent personnel.* Constituting part of the armed force of a belligerent State and, therefore, in so far as they carry on operations at sea, subject as such to the laws of naval warfare, are:

"1. The personnel of the ships mentioned in Article 2;

"2. The troops of the naval forces, active or reserve;

"3. The militarized personnel on the seacoasts;

"4. The regular forces, other than naval forces, or those regularly organized in conformity with Article 1 of The Hague Regulations of October 18, 1907, concerning the laws and customs of war on land."

Institute (1913), p. 176.

"ARTICLE 56. *Public or private vessels.*—When an enemy ship, public or private, is seized by a belligerent, * * *. The captain, officers and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war."

Institute (1913), p. 189.

"ART. 58. All persons constituting part of the crew of a public or a private enemy ship are, in the absence of proof to the contrary, presumed to be of enemy nationality."

Institute (1913), p. 189.

"ART. 59. Members of the personnel of an enemy ship which, because of its special character, is itself exempt from seizure, cannot be held as enemies."

Institute, p. 189.

Contra.

"Sailors on board enemy's trading vessels become prisoners because of their fitness for immediate use on ships of war." (Hall, p. 421.) In a foot-note Hall says: "In 1870 Count Bismarck denied that sailors found in merchant vessels can be made prisoners of war, and in a note addressed to the government of the National Defense threatened to use reprisals if those who had been captured were not liberated. In justification of his doctrine he pretended that the only object of seizing merchant seamen is to diminish the number of men from

whom the crews of privateers could be formed, and that therefore as France was a party to the Declaration of Paris, it must be supposed that it had 'adhered in advance' to their immunity from capture. The Comte de Chaudordy had no difficulty in showing that no such inference could be drawn from the fact of adherence to the Declaration of Paris, that the usage of capturing sailors had been invariable, that the mercantile marine of a nation, apart from any question of privateering, is capable of being transformed at will into an instrument of war, and that in countries where, as in Germany, all seafaring men are subject to conscription for the navy of the state, the reasons for capture are of double force (D'Angeberg, Nos. 580, 694, 813, 826, 911). Count Bismarck executed his threat to use reprisals, and sent Frenchmen of local importance as prisoners to Bremen in a number equal to that of the captains of merchantmen who were detained in France. The pretension of Count Bismarck to create an international rule by his simple fiat need scarcely be treated seriously, but it is a matter for indignation that he should attempt to prevent an adversary from acting within his undoubted rights by means which are reserved to punish and to brand violations of law."

The immunities provided in this article, which immunities "the Japanese largely anticipated in their war of 1904–1905 with Russia,[1] are made to depend on a peaceful delivery of the vessel. Under modern conditions of warfare resistance would in the vast majority of cases amount to madness, and would, therefore, be attempted very rarely. But when made, it would, of course, deprive those who made it of freedom from capture as prisoners of war. Should the crew of a belligerent merchantman make an unprovoked attack on a vessel of the enemy, they would be liable now, as of old, to the severities exercised against non-combatants who perform hostile acts."

Lawrence, p. 369.

Contra.

"The capture of enemy ships always carried with it the right to detain their crews as prisoners. Indeed the doctrine of *courir sus aux ennemis* was from the first as much directed against persons as against things. In the war of 1870 Prussia protested against the detention of North German sailors captured in merchant vessels, as having lost its legal base by the abolition of privateering. The connection of ideas is difficult to see, and France maintained her right. This old practice deprived the enemy of important resources, both of ships which might be available as transports or for purposes of supply, and of men who might render service on board ships so employed or in the fighting navy, and indeed would in general be legally compellable to do so. And thereby the capture of enemy property at sea and that of enemy sailors were connected with one another in a manner peculiarly important to England, of which no soldier and only some sailors consider the invasion to be unthinkable, and to the invasion of which the rapid collection of a sufficient number of transports and of crews to man them would be indispensable." But this old doctrine has received important modifications by the adoption of the Hague XI, 1907. "Without being

[1] See also Takahaski, International Law applied to Russian-Japanese War, pp. 138, 139.

unduly depreciatory of the value of written promises given by great masses of men against the interest of their country, it must be admitted that the convention in question has diminished, without however entirely destroying, the security which the capture of enemy merchant ships gave against the collection of the necessary means for an invasion."

Westlake, vol. 2, pp. 146, 147.

Personal Effects of Captain, Crew, and Passengers.

"Whether from a feeling of humanity, or because personal effects are not within the justificatory reasons for the existing practice of naval war, although they were included in the original doctrine of *courir sus*, the personal effects of the captain and crew of a captured ship are not condemned as prize. And the same favour is extended, so long as the parcels are really small, to small parcels of merchandise being the 'adventures,' *pacotilles* in French, which it has been customary to allow captains to make on their own account. Passengers would no doubt enjoy the same immunity for their personal effects, but even supposing them to enjoy an immunity for their adventures, the question of degree arising in the case of an adventure might be less easily decided in their favour than in the case of the captain, since there would be nothing but the degree to distinguish them from merchants."

Westlake, vol. 2, pp. 154–155.

"Art. 18. The Commander should detain any Enemy Vessel which he may meet with, whatever are the ports between which she is trading. Her Officers and Crew are Prisoners of War."

Naval Prize Law, Holland.

"Art. 50. The master of an enemy vessel, and her crew, may be taken prisoners.

"Passengers, and the master and crew of a ship which is not an enemy vessel, must not be taken prisoners. Persons, however, who are considered necessary as witnesses may be forcibly detained."

"Art. 78. The commander of the warship and his officers shall treat the master of the [captured] ship, her crew, and persons to be made prisoners with courtesy, and take care that their private property is protected.

"Although restraint may be employed, according as necessity arises, in the case of persons to be made prisoners, it must not be employed, in the absence of special reasons, in the case of other persons on board."

"Art. 81. The commander of the warship shall put the master, crew, and all the cargo, certificates, and papers seized on board the ship, arrange for the condition of the ship to be kept, as far as possible, the same as at the time of capture, and send her off.

"The commander of the warship shall, if he considers it necessary, take the opportunity to put on board the [captured] ship those of the persons under his command who can testify to her condition at the time of capture."

"Art. 82. If the commander of the warship considers it (in?) advisable to send the master and the whole crew with the [captured] ship, he shall select at least three or four of the more important per-

sons and send them as witnesses. Of these two shall be master and the purser; the remainder shall be made up from among the mates and boatswains.

"Those of the crew who are transferred to another vessel shall be sent at once to the port to which the ship which has been captured has been ordered to sail."

Japanese Regulations, 1904.

"99. If a ship is captured under 16, b, (resistance) or 55, a, (taking part in hostilities), those persons who without being enrolled in the enemy forces have taken part in the hostilities or have exerted forcible resistance, may be dealt with according to the customs of war. The other persons of the crew will be made prisoners of war. Concerning the crews of armed merchant ships, see the appendix."

German Prize Rules, 1909.

"137. The captain, officers, and members of the crew, if nationals of the enemy State, shall not be made prisoners of war on condition of engaging, under faith of a formal written promise, not to engage during the continuance of the hostilities in any service having relation to the operations of the war."

"138. You will deliver to the interested persons receipts for the promises that they have given in the terms of paragraphs * * * and 137. Moreover, you will take care to acquaint me and cause the enemy to be acquainted, by every possible way, with the names of the individuals left at liberty under the conditions referred to in the above named paragraphs."

"142. Every person found on board an enemy merchant vessel is, in the absence of proof to the contrary, presumed to be of enemy nationality."

French Naval Regulations, 1912.

"161. * * * As to the enemy personnel that is not military found on board the same [rescued] vessel, you will act according to Articles 6 and 7 of Convention XI of the Hague."

French Naval Regulations, 1912.

Article 6, Hague XI, 1907, substantially appears as Art. 37 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"During the war between the United States and Spain, in 1898, the officers and crews of various Spanish vessels which were captured as prize by the American forces were, while in the custody of the latter, allowed to send to and receive from their families in Spain open communications, as well as to correspond in the same manner with the owners of the vessels. For. Rel. 1898, 789–790, 792, 793, 794."

Moore's Digest, vol. 7, p. 371.

"The Spanish steamer *Panama*, while on a voyage from New York to Havana, was, after the outbreak of war, between the United States and Spain, captured as prize by the American naval forces. Among those found on board was a Spanish subject, who

gave his name as Mr. Jiminez Zapatero. As he had in his possession a lot of coast charts, which he threw overboard, and as he had in his trunk epaulets and a sword, and admitted that he had some years before been an officer in the Spanish navy, he was held as a military person and was sent to Fortress Monroe as a prisoner of war. Orders were given to furnish him with accommodations and treat him according to the rank that he should claim, but, as he refused to make any statement beyond giving his name, he was held as a private. After the conclusion of the protocol of Aug. 12, 1898, as a preliminary to the conclusion of a peace, he was released. For. Rel. 1898, 794, 798, 809."

Moore's Digest, vol. 7, p. 371.

"After the outbreak of war between the United States and Spain in 1898, various Spanish merchant vessels, captured as prize by the American naval forces, were sent to Key West for judicial proceedings. The officers and crews, in order to afford them subsistence, were turned over to the military authorities and were 'harbored and protected' at the Key West barracks. June 24, 1898, the United States, being desirous of making an arrangement for sending them away, notified the French ambassador, who was charged with the care of Spanish interests, that it would give instructions for their subsistence and protection on their way to a place of embarcation. June 30, 1898, notice was given that they would be sent to New York, where it was requested that they should be committed to the care of the consul-general of Austria-Hungary, to whom the protection of Spanish interests at that port was entrusted.

"In a case where a Spanish brig flying the flag of Honduras was captured while attempting to run the blockade of Havana, and was condemned and ordered to be sold, the United States, while disclaiming any desire to detain the persons found on board, stated that it did not think itself under 'any obligation to provide them with the means of transportation, especially as the devices resorted to by the brig for the purpose of escaping lawful capture must have been known to those on board.' For. Rel. 1898, 789, 795-800."

Moore's Digest, vol. 7, pp. 370, 371.

"It was stated by the Japanese minister in Washington, on April 9, 1904, that his Government had released all the passengers on board of Russian merchant vessels captured by Japanese cruisers, and even the officers and members of the crew, except those whose presence was deemed necessary in the trial before the admiralty court. For. Rel. 1904, 433, 434."

Moore's Digest, vol. 7, pp. 371, 372.

In the case of the *Ekaterinoslav* (vol. 2, Russ-Jap. P. C., p. 1), money carried on an enemy merchant vessel for the purpose of paying the crew was held by the Japanese Prize Court at Sasebo to be subject to condemnation.

In the case of the *Knight Commander* (1911) (vol. 1, Russ-Jap. P. C., pp. 54, 95), a neutral merchant vessel destroyed by the Russian naval forces, the master was given compensation for his personal effects. This was in accordance with Article 10 of the Russian Regulations, as to Naval Prizes, approved March 27, 1895 and issued July 14, 1895.

NAMES OF PAROLED OFFICERS AND SEAMEN OF MERCHANT VESSEL TO BE NOTIFIED TO OPPOSING BELLIGERENT, WHO MUST NOT EMPLOY THEM.

The names of the persons retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.—*Article 7, Hague XI, 1907.*

"ARTICLE 57. The names of the persons retaining their liberty on condition of the promise provided for by the preceding Article [56], are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons."

Institute (1913), p. 189.

"138. * * * Moreover, you will take care to acquaint me and cause the enemy to be acquainted, by every possible way, with the names of the individuals left at liberty under the conditions referred to in the above named paragraphs" [136 and 137].

French Naval Regulations, 1912.

"161. * * * As to the enemy personnel that is not military found on board the same [rescued] vessel, you will act according to Articles 6 and 7 of Convention XI of the Hague."

French Naval Regulations, 1912.

Article 7, Hague XI, 1907, substantially appears as Art. 38 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The provisions of the three preceding articles do not apply to ships taking part in the hostilities.—*Article 8, Hague XI, 1907.*

"ARTICLE 60. When a public or a private ship has directly or indirectly taken part in the hostilities, the enemy may retain as prisoners of war the whole personnel of the ship, without prejudice to the penalties he might otherwise incur."

Institute (1913), p. 190.

"ARTICLE 61. Members of the personnel of a public or of a private vessel, who are personally guilty of an act of hostility towards the enemy, may be held by him as prisoners of war, without prejudice to the penalties he might otherwise incur."

Institute (1913), p. 190.

Attack by Noncommissioned Persons.

"Although a state of war puts all the subjects of the one nation in a state of hostility with those of the other, yet, by the customary law of Europe, every individual is not allowed to fall upon the enemy. If subjects confine themselves to simple defense, they are to be considered as acting under the presumed order of the state, and are entitled to be treated by the adversary as lawful enemies; and the captures which they make in such a case are allowed to be lawful prize. But they cannot engage in offensive hostilities, without the express permission of their sovereign; and if they have not a regular commission, as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the protection of the mitigated rules of modern warfare."

Kent, vol. 1, p. 104.

Captures by Private Armed Vessels.

"It must probably be considered as a remnant of the barbarous practices of those ages when maritime war and piracy were synonymous, that captures made by private armed vessels, without a commission, not merely in self-defense, but even by attacking the enemy, are considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own government or by the other belligerent State."

Wheaton, p. 452.

Merchant Vessels May Resist but not Attack.

"Non-commissioned vessels have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews

therefore which make such resistance have belligerent privileges; and it is a natural consequence of the legitimateness of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and making the enemy prisoners of war.

"By some writers it is asserted that a non-commissioned ship has also a right to attack. If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it, there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument. There is no such reason at sea as there is on land for permitting ill-regulated or unregulated action. On the common ground of the ocean a man is not goaded to leave the non-combatant class, if he naturally belongs to it, by the peril of his country or his home. Every one's right to be there being moreover equal, the initiative in acts of hostility must always be aggressive; and on land irregular levies only rise for defence, and are only permissible for that purpose. It is scarcely necessary to add that non-commissioned ships offer no security that hostilities will be carried on by them in a legitimate manner. Efficient control at sea must always be more difficult than on land; and if it was found that the exercise of due restraint upon privateers was impossible, *a fortiori* it would be impossible to prevent excesses from being indulged in by non-commissioned captors.

Hall, pp. 550, 551.

Merchant Vessels' Right of Defense.

"In a sense the crews of merchantmen owned by subjects of the belligerents belong to the latter's armed forces. For those vessels are liable to be seized by enemy men-of-war, and if attacked for that purpose they may defend themselves, may return the attack, and eventually seize the attacking men-of-war. The crews of merchantmen become in such cases combatants, and enjoy all the privileges of the members of armed forces. But unless attacked they must not commit hostilities, and if they do so they are liable to be treated as criminals just as are private individuals who commit hostilities in land warfare. Some writers assert that, although merchantmen of the belligerents are not competent to exercise the right of visit, search, and capture towards neutral vessels, they may attack enemy vessels—merchantmen as well as public vessels—not merely in self-defence but even without having been previously attacked, and that, consequently, the crews must in such case enjoy the privileges due to members of the armed forces. But this opinion is absolutely without foundation nowadays, even in former times it was not generally recognised.

"It should be mentioned in regard to the fate of the crews of captured merchantmen that a distinction is to be made according as to whether or no a vessel has defended herself against a legitimate attack. In the first case the members of the crew become prisoners of war, for by legitimately taking part in the fighting they have become members of the armed forces of the enemy." In the second case, articles 5–7, Hague XI of 1907, apply.

Oppenheim, p. 104.

Attack by Merchant Vessel Piratical.

"Any merchantmen of a belligerent attacking a public or private vessel of the enemy would be considered and treated as a pirate, and the members of the crew would be liable to be treated as war criminals to the same extent as private individuals committing hostilities in land warfare. However, if attacked by an enemy vessel, a merchantman is competent to deliver a counter-attack and need not discontinue her attack because the vessel which opened hostilities takes to flight, but may pursue and seize her.

"It must be specially mentioned that an attack upon enemy vessels on the sea may be made by forces on the shore. For instance, this is done when coast batteries fire upon an enemy man-of-war within reach of their guns. Enemy merchantmen, however, may not be attacked in this way, for they may only be attacked by men-of-war after having been signalled in vain to submit to visit."

Oppenheim, vol. 2, p. 226.

"The question whether a ship is engaged in a purely commercial undertaking or participating in hostilities is a question of fact on which the Convention makes no attempt to lay down any definite rule."

Higgins, p. 406.

"54. Persons who without being enrolled in the enemy forces assist the operations of the enemy directly during the voyage (48 b) may be taken prisoner only upon simultaneously bringing in the ship."

German Prize Rules, 1909.

"139. The above provisions [paragraphs 135–138 inclusive] do not apply to ships taking part in hostilities."

French Naval Regulations, 1912.

Article 8, Hague XI 1907, appears as Art. 39 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

A merchant ship converted into a war-ship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.—*Article 1, Hague VII, 1907.*

"ARTICLE 3. *Conversion of public and private vessels into war-ships.*—A vessel converted into a warship cannot have the rights and duties accruing to such vessels, unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies."

Institute (1913), p. 176.

"ARTICLE 9. The conversion of a vessel into a warship may be accomplished by a belligerent only in its own waters, in those of an allied State also a belligerent, in those of the adversary, or, lastly in those of a territory occupied by the troops of one of these States."

Institute (1913), p. 176.

"ARTICLE 10. *Conversion of warships into public or private vessels.*—A warship may not, while hostilities last, be converted into a public or a private vessel."

Institute (1913), p. 176.

"ARTICLE 13. *Population of unoccupied territory.*—The inhabitants of a territory which has not been occupied who, upon the approach of the enemy, spontaneously arm vessels to fight him, without having had time to convert them into war-ships in conformity with Articles 3 and following, shall be considered as belligerents, if they act openly and if they respect the laws and usages of war."

Institute (1913), p. 177.

Volunteer Naval Force.

In a decree of July 24, 1870, shortly before the Franco-Prussian War, the "King of Prussia invited all German Seamen and Shipowners to place themselves and their forces and ships suitable thereto at the service of the Fatherland. The officers and crews were to be enrolled by the owners of the ships and were to enter into the Federal Navy for the continuance of the war, and to wear its uniform and badge of rank, to acknowledge its competence and to take an oath to the Articles of War. The ships were to sail under the Federal Flag and to be armed and fitted out for the service allotted to them by the Federal Royal Navy. The ships destroyed in the service of their country were to be paid for to their owners at a price taxed by a Naval Commission, and a sum was to be paid by the State as a deposit, when the ships were placed at the service of the State, which,

at the end of the war, when the ships were restored to the owners, was to be reckoned as hire. The French Government, regarding the institution by Prussia of a volunteer naval force as the revival of privateering under a disguised form, lost no time in calling the attention of the British Government to the Royal Prussian Decree, as instituting an auxiliary marine contrary to Prussia's engagements under the Declaration of 1856. Earl Granville, on behalf of the British Government, referred the matter to the Law Officers of the Crown, and in accordance with their opinion returned for answer, 'that there was a substantial difference between the proposed Naval Volunteer Force sanctioned by the Prussian Government and the system of Privateering which, under the designation of "La Course," the Declaration of Paris was intended to suppress, inasmuch as the vessels referred to in the Royal Prussian Decree would be for all intent and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the Federal Navy.' Upon these considerations the British Government could not object to the Decree of the German Government as infringing the Declaration of Paris.

"There is not an unanimity of opinion amongst text writers on International Law on the subject of this Prussian Auxiliary Marine, as to whether its institution was in conflict with the Declaration of Paris or not. M. Charles Calvo, Ancien Ministre, considers that vessels equipped in accordance with the Prussian Decree may be regarded as privateers of an aggravated character, seeing that the owners are not required to give security for their good conduct; and Mr. W. E. Hall, in his recent work on International Law, p. 455, observes that 'unless a Volunteer Navy could be brought into closer connection with the State than seems to have been the case in the Prussian project, it would be difficult to show that its establishment did not constitute an evasion of the Declaration of Paris.' But neither of these eminent publicists seem to have given sufficient weight to the provisions of the Prussian Decree, under which the officers and crew were required to enter into the Federal Navy for the continuance of the war, were to wear its uniform and to take an oath to the Articles of War. Further, the vessels were to be fitted out by the State, and were to sail under the Public Flag of the State.

"On the other hand, Professor Geffcken, in his recent edition of Heffter's Droit International de l'Europe (Paris, 1883), p. 278, and Dr. Charles de Boeck in his masterly treatise on Enemy's Property under an Enemy's Flag, have recognised a broad distinction between such an auxiliary force, which under the Royal Decree was intended to be employed solely against the enemy, and privateers, which may be of no matter what nationality, and whose main object it has always been to prey upon neutral commerce, keeping up the worst traditions of private warfare under cover of Letters of Marque. It should be observed that the Prussian Government never gave practical effect to the Royal Decree on this subject, and that no vessel of the 'Seewehr,' as instituted in 1870, ever put to sea. (Staats Archiv., 4,345, 4,346.)"

Twiss, Belligerent Right on High Seas (1884), pp. 12–14.

Volunteer Fleet.

"A measure taken by Prussia during the Franco-German War of 1870 opens a rather delicate question as to the scope of the engage-

ment not to employ volunteers by which the signataries of the Declaration of Paris are bound. In August of that year the creation of a volunteer navy was ordered by decree. The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be mechant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services; the vessels were to sail under the flag of the North German Navy. The French Government protested against the employment of private vessels in this manner as an evasion of the Declaration of Paris, and addressed a despatch on the subject to the government of England. The matter was laid before the law officers of the Crown, and they reported that there were substantial differences between a volunteer navy as proposed by the Prussian government and the privateers which it was the object of the Declaration to suppress. Lord Granville in consequence declared himself unable to make any objection to the intended measure on the ground of its being a violation of the engagement into which Prussia had entered. Nevertheless it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organized in the above manner would necessarily be always of a kind to prevent the two from being identical in all important respects. In both the armament is fitted out by persons whose motive is wish for gain, in both the crews and officers are employed by them and work therefore primarily rather in their interests than in those of the nation. The difference that in the particular case of the Prussian volunteer navy attacks upon men of war were alone contemplated was accidental and would have been temporary. At the beginning of the war Prussia announced her intention not to capture private property at sea in the hope of forcing France to spare the commerce which she was herself unable to protect. If the war had been continued for any length of time after January, 1871, when this announcement was withdrawn, and if a volunteer navy had in fact been formed, it would of course have been authorized to capture private property; and there is no reason to suppose that any state acting upon the custom of seizing private property would make a distinction between public and private vessels in the powers given to its volunteer navy. The sole real difference between privateers and a volunteer navy is then that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it. It cannot be supposed that the Declaration of Paris was merely intended to put down the use of privateers governed by the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief was well founded or not is another matter. If the organization intended to be given to the Prussian volunteer navy did not possess sufficient safeguards, some analogous organization no doubt can be procured which would

provide them. If so, there could be no objection on moral grounds to its use; but unless a volunteer navy were brought into closer connexion with the state than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris.

"The incorporation of a part of the merchant marine of a country in its regular navy is of course to be distinguished from such a measure as that above discussed. A marked instance of incorporation is supplied by the Russian volunteer fleet. The vessels are built at private cost, and in time of peace they carry the mercantile flag of their country; but their captain and at least one other officer hold commissions from their sovereign, they are under naval discipline, and they appear to be employed solely in public services, such as the conveyance of convicts to the Russian possessions on the Pacific. Taking the circumstances as a whole, it is difficult to regard the use of the mercantile flag as serious; they are not merely vessels which in the event of war can be instantaneously converted into public vessels of the state, they are properly to be considered as already belonging to the imperial navy. The position of vessels belonging to the great French mail lines is different. They are commanded by a commissioned officer of the navy, but so long as peace lasts their employment is genuinely private and commercial; means is simply provided by which they can be placed under naval discipline and turned into vessels of war so soon as an emergency arises. They are not now incorporated in the French navy, but incorporation would take place on the outbreak of hostilities."

Hall, 547–550.

A volunteer navy "is a new product of creative ingenuity." The question raised in 1870 in respect to this character of a navy 'was not settled by the collapse of the Prussian project. Soon a movement began in naval affairs similar to that whereby militia and volunteer corps gradually won recognition in land warfare. In the winter of 1877–78, when there was imminent danger of hostilities between England and Russia, the latter power accepted the offer of a patriotic association to create a volunteer fleet, the vessels of which were to be purchased by private subscription, but made over to state control during the contemplated war, and commanded by officers of the Imperial Navy. Fortunately, the questions at issue were settled by the Treaty of Berlin; but the Russian Volunteer Fleet survived the circumstances that gave it birth, and exists at the present time. * * * In time of war the vessels of the Volunteer Fleet may be transferred to the naval or military departments by administrative order. Though the Sultan has been constrained by diplomatic pressure to regard them as merchant vessels, in order that they may freely pass the Dardanelles and the Bosphorus, which are closed in time of peace to the men-of-war of foreign states, it is difficult to resist the conclusion that 'they are properly to be considered as already belonging to the imperial navy.' Great Britain and America have adopted a somewhat different system. The former led the way in 1887 by entering into agreements with the Cunard line, the White Star line, and other great steamship companies, whereby, on consideration of an annual subsidy, they agreed to sell or let certain swift

vessels to the government at a fixed price and on short notice, and to build new ships according to plans to be approved by the Admiralty, who were to be at liberty to acquire them on terms similar to those accepted in the case of the existing fleet. Half the seamen on board the vessels subject to these agreements were to be engaged from the Royal Naval Reserve, and the Admiralty was to have the right of placing on board fittings and other arrangements which would facilitate the speedy equipment of the vessels as cruisers in the event of war. In 1891 the government of the United States acquired powers of a like kind over the vessels of the American line, and in 1898 some of them were taken over and did good service during the war with Spain. There is nothing in these agreements to which the most scrupulous legalist can object; and the same may be said of the systems adopted by France, Japan, and other naval powers, and also of the more recent British plan of subsidizing a great shipping company to build according to Admiralty designs on the understanding that the vessels so constructed will be taken over in time of war. The legality of a Volunteer Navy must depend, like the legality of a Volunteer Army, upon the closeness of its connection with the state, and the securities it affords for a due observance of the laws of war."

Lawrence, 523–526.

Where Conversion May Take Place.

The question of where the conversion may take place "was preeminently a case for international legislation, and such unfortunately it still remains. Arguing on general principles it seems impossible to deny that a belligerent would commit a gross violation of neutrality, if it presumed to set forth one of its merchantmen as a man-of-war in neutral territorial waters. Conversely a neutral that allowed such a high act of sovereignty to be performed by a belligerent within its waters would render itself liable to reclamations from the other party, which might suffer great loss from its weakness, carelessness, or partiality. At the end of the eighteenth century it was admitted that the establishment of belligerent prize courts in neutral ports was a grievous offence; and it cannot surely be contended at the beginning of the twentieth century that the commissioning of belligerent war-ships therein is anything less. On the other hand, the principle of territorial sovereignty allows every state to turn into fighting ships whatever members of its own mercantile marine it pleases, in its own ports and waters. The same principle would justify the mutual grant by allies in a war of liberty of conversion in each other's ports; and the legal powers of a military occupant are so great in things relating to the war that they may be taken to include a right of converting in all territorial waters that he controls fully and continuously by force of his arms. All this would probably be conceded by important maritime powers. But a region of serious contention is entered when we come to consider conversion on the high seas.

"The question cannot be settled by any clear deduction from admitted principles. On the high seas states habitually exercise powers of sovereignty over their vessels, both public and private, and over the persons and things within them. And certainly the powers of sovereignty include the right to turn a merchantman into a man-of-war, or a man-of-war into a merchantman. But they also include

the right to set up a prize court; and yet belligerents are not allowed to do anything of the kind in the cabins of their cruisers. It may well be argued that by parity of reasoning they cannot be allowed to change the character of their vessels. In answer to this it would be said that the conversion of a merchantman taken from the enemy into a vessel of war, by putting on board an officer and crew from the captor's complement, is acknowledged as lawful,[1] and has been done frequently by maritime belligerents. Why then, it might be asked, can they not turn their own merchantmen into cruisers on the open sea? And why may they not go a little further, and send their merchantmen to sea in such a condition that they can convert themselves when they come to a convenient spot?

"It is impossible to give a decided answer to these questions as long as we confine ourselves to general reasoning. We must base our conclusions on a study of the consequences of unrestricted conversion. We shall find that the advantages are confined to belligerents, and among them to those who possess a considerable mercantile marine and but few ports of their own in distant parts of the world. It would be convenient for them to be able to place their commerce destroyers in the midst of a distant hunting ground, by sending them to sea as merchantmen, obtaining for them as such the hospitality of neutral ports, and ordering them to change themselves into war-ships when they were safely established on a great trading route of the enemy. But states with few vessels capable of being converted, and states with many ports in distant seas, would find the process impossible or useless. The disadvantages would be felt by all neutrals interested in sea-borne commerce, and by all belligerents whose mercantile marine spread itself over a wide area of ocean in its trading operations. Neutrals would be placed in a specially unfavorable position. For not only would they find their trade harried by vessels which were deemed to be peaceful merchantmen till they began warlike operations, but they would also be subject to the complaints and threats of belligerents whose ships were attacked by cruisers which just before had received in their ports facilities not accorded to war-ships. Indeed, they themselves might suffer in this way: for there would be nothing to prevent a potential cruiser from obtaining a refit and full supplies of coal in a neutral port, and then turning itself into a war-ship as soon as it had passed out of territorial waters, and making prize of a vessel of the neutral whose hospitality it had just received. However guilty the vessel in question might turn out to be, a rankling feeling of injustice could not fail to arise over her capture. Nothing more calculated to make difficulties between neutrals and belligerents could well be imagined than the liberty of unrestricted conversion that some of the powers contend for; while the advantages to themselves would be more apparent than real, for a *guerre de course* is rarely decisive.

"On the other hand, Great Britain and her supporters are inconsistent when they object to the transformation at sea of belligerent merchantmen into belligerent war-ships, and at the same time desire to retain the liberty of turning their prizes taken from an enemy

[1] "It is asserted that a captured enemy merchantman may at once be converted by the captor into a man-of-war, but the cases of the *Ceylon* (1811) and the *Georgina* (1814), I Dodson, 105 and 397, which are quoted in favor of such a practice, are not decisive." Note 2, Oppenheim, vol. 2, p. 231.

into war-ships on the spot. A state's own merchantmen and the merchantmen of its enemy should be treated alike in this connection. The principle of convertibility or the principle of inconvertibility should be adopted, but whichever is chosen should be applied all round. We have already seen reason to lean to the side of the latter, and the arguments in favor of it become overwhelming when we reflect that conversion implies reconversion. The existence of a race of maritime hermaphrodites, which can be men-of-war when a capture is to be made and vessels of commerce when shelter and supply are required in neutral ports, is foreign to all ideas of honorable warfare. Moreover, it would be full of danger to the peace and security of neutrals. They are already more than sufficiently injured and annoyed by the rights over their commerce conferred on belligerents. Why should they be made to bear a further burden in quarrels that are not their own? It would, of course, be possible, while allowing conversion, to forbid reconversion in the same war, as was suggested by Austria at the Hague in 1907. This, and the Italian proposal to confine the right of conversion to merchant ships that left the territorial waters of their own state before the outbreak of hostilities, might have made a workable compromise. Another was suggested by Great Britain, when her delegates at the Naval Conference of 1908–1909 were instructed that 'difficulties might be met by restricting the right of conversion on the high seas to the case of vessels which had been specifically and publicly designated by the respective governments as suitable for the purpose and borne on their navy lists: and by subjecting such vessels, while in neutral ports, to the same treatment as belligerent men-of-war.'[1] But no proposal was able to secure agreement."

Lawrence, pp. 528–532.

The owners of the German merchant vessels at the outbreak of the Franco-Prussian war were invited to make their vessels a part of the German navy under the following conditions: "Every ship should be assessed as to her value, and 10 per cent of such value should at once be paid in cash to the owner as a price for the charter of the ship. The owner should engage the crew himself, but the latter should become for the time of the war members of the German navy, wear the German naval uniform, and the ship should sail under the German war flag and be armed and adapted for her purpose by the German naval authorities. Should the ship be captured or destroyed by the enemy, the assessed value should be paid to her owners in full; but should it be restored after the war undamaged, the owner should retain the 10 per cent received as charter price. All such vessels should only try to capture or destroy French men-of-war, and if successful the owner should receive a sum between £1500 and £7500 as premium. The French Government considered this scheme a disguised evasion of the Declaration of Paris * * * and requested the intervention of Great Britain. The British Government brought the case before the law officers of the Crown, who declared the German scheme to be substantially different from the revival of privateering, and consequently the British Government refused to object to it. The scheme, however, was never put into practice.

[1] British Parliamentary Papers, Miscellaneous, No. 4 (1909), p. 31.

"Now, in spite of the opinion of the British law officers, writers on International law differ as to the legality of the above scheme: but, on the other hand, they are unanimous that not every scheme for a voluntary fleet is to be rejected. * * *

"Matters were brought to a climax in 1904, during the Russo-Japanese War, through the cases of the *Peterburg* and the *Smolensk*. On July 4 & 6 of that year, these vessels, which belonged to the Russian Volunteer Fleet in the Black Sea, were allowed to pass the Bosphorus and the Dardanelles, which are closed to men-of-war of all nations, because they were flying the Russian commercial flag. They likewise passed the Suez Canal under their commercial flag, but after leaving Suez they converted themselves into men-of-war by hoisting the Russian war flag, and began to exercise over neutral merchantmen all rights of supervision which belligerents can claim for their cruisers in time of war. On July 13 the *Peterburg* captured the British P. & O. steamer *Malacca* for alleged carriage of contraband, and put a prize crew on board for the purpose of navigating her to Libau. But the British Government protested,[1] the *Malacca* was released at Algiers on her way to Libau on July 27, and Russia agreed that the *Peterburg* and the *Smolensk* should no longer act as cruisers, and that all neutral vessels captured by them should be released.

"This case was the cause of the question of the conversion of merchant-men into men-of-war being taken up by the Second Peace Conference in 1907."

Oppenheim, vol. 2, pp. 100–103.

Conversion on High Seas.

As the preamble to H. VII expressly leaves open the question of the place where the conversion may take place, "those Powers which claim that conversion must not take place on the High Seas are not, therefore, prevented from refusing to acknowledge the public character of any vessel, which had been converted on the High Seas, and

[1] "The grounds of the British protest were, firstly, that it was a breach of treaty obligations on the part of these Russian vessels to assume the Russian war flag after passing out of the Black Sea flying the commercial flag; it scarcely needs to be stated that the vessels could not have passed out flying the Russian war flag, as by the treaties of 1841, 1856, 1871, and 1878, Great Britain and Russia recognize that the straits are closed to ships of war, saving certain exceptions. The case might have been different if the vessels had returned to the Baltic and there been commissioned. Furthermore it might well be that as against Japan, the vessels were entitled to a public status, yet as against Great Britain such a status could not be recognized, when treaty rights had been violated; secondly, that in view of the position Russia took up as to unconditional contraband of war, the exercise of the right of visit and search and of detention was unreasonable in the neighborhood of the Red Sea, being thousands of miles from the theatre of war, and resulting in the interference with the sailing of all neutral ships, a large proportion of which were not bound for Japan at all. (Parl. Debates [4th series] vol. 138, pp. 1434–1436; vol. CXL, pp. 154–159.) Lord Lansdowne writes to Sir C. Hardinge, the British ambassador accredited to Russia: 'Russian vessels have been told off for the purpose of searching for such contraband not only in the proximity of the scene of war, but all over the world, selecting for the purpose points at which neutral commerce can be most effectually intercepted. His Majesty's Government have lately become aware that a large addition is likely to be made to the number of Russian cruisers employed in this manner, and we must, therefore, contemplate the possibility that such vessels will shortly be found patrolling the narrow seas which lie on the route from Great Britain to Japan in such a manner as to render it virtually impossible for any neutral vessel to escape their attention. The effects of such interference with neutral trade will be disastrous to legitimate commerce passing from a British Port, in the United Kingdom to a British Port in the Far East.' (Parl. Papers, Cd. 2348 at p. 12.)

"In the case of the *Malacca*, of course, the seizure of the vessel for carrying contraband of war was utterly illegal, as the munitions of war were marked with the British Government's mark. (Paris Debates [4th series], vol. 138, p. 1434.)"

Halleck, Int. Law (4th Baker's ed.), vol. 2, p. 137, note.

from upholding their view that a converted vessel may not alternately claim the character and the privileges of a belligerent man-of-war and a merchantman."

Oppenheim, vol. 2, 104.

Conversion on High Seas.

"The German & Russian delegations maintained that conversion ought to be allowed in the open sea, as being a place subject to no jurisdiction foreign to that of the converting state, and that since it is permitted to turn captured ships into ships of war in the open sea, the same ought to be allowed for one's own merchant-men. In answer it was pointed out that neutrals would be exposed to the consequences of the change of a ship's character made in the open sea without their having an opportunity of knowledge, and that a merchantman which had benefited by the hospitality of a neutral port ought not afterwards to abuse it by a conversion. It must be confessed that the former argument is difficult to refute from the side of the *lex lata*, but the latter argument is so strong on the side of the *lex ferenda* that a neutral state aggrieved by the consequences of a conversion on the high seas would in all probability refuse to the new ship of war admission to her ports."

Westlake, vol. 2, p. 308.

Proceedings at Hague Conference.

The questions considered by the Committee charged with drawing up the Convention (H, VII of 1907) were five in number "(1) Can merchant-ships be converted into ships of war? (2) What is a ship of war? (3) Where can conversion take place? (4) How long does the conversion last? (5) What regulations shall be applied to merchant-ships converted into ships of war.

"No difficulty was occasioned in giving an affirmative answer to the first question; very little also was occasioned in framing the regulations to be applied to such vessels, and any doubt which may have been raised as to the re-introduction of privateering under the guise of volunteer fleets has been effectually dispelled by the acceptance of the six rules embodied in this Convention—'Privateering is and remains abolished.' * * * These Articles embody the general principles which had been accepted by states, and except for the points raised on Articles 3 and 5 were accepted without discussion. The Convention does not go very far, but it may be welcomed as a beginning of a set of written rules on the subject. The other questions discussed were found to be insoluble.

"Lord Reay [British delegate plenipotentiary] desired to go to the root of the whole matter at the beginning. The legality of the conversion of merchant ships into 'ships-of-war' was not doubted, but the fundamental question, which, acting on the instructions of the British Government, he sought to have settled was—what is a ship of war? The difficulty is not peculiar to this question, but is equally important as regards the meaning to be attributed to the exemption from capture provided for in Article 5 of the previous Convention [HVI—1907] * * * A modern navy to be effective must contain more than battle-ships, fast cruisers, torpedo-boats and destroyers and submarines. If a fleet is to remain for any length of

time at sea, especially if its state does not possess a large number of coaling stations within the area of its operations, it needs a whole auxiliary fleet of colliers, repairing ships, supply ships, despatch vessels, transports for the carriage of men, ammunition, etc. The following proposition introduced by Lord Reay was framed to meet modern conditions. 'There are two classes of ships of war: (A) fighting ships (vaisseaux de combat), (B) auxiliary ships (vaisseaux auxiliaries).' He proposed to assimilate to the status of the fighting ships of the navy the auxiliary ships used for any purpose of the fleet. Objection was taken to this on the ground that the principles of 'unneutral service' were involved, and that this subject was not included in the Programme of the Conference. Lord Reay subsequently withdrew his proposed definition. The question of the length of the period of the conversion of merchant-ships is important in this connection and this point was also discussed in connection with the place of conversion. Lord Reay, having abandoned the attempt to include auxiliary ships under the head of ships of war, developed his proposals in regard to Class A. 'fighting ships' which were defined as: 'Every ship flying a recognized flag, armed at the expense of the state for attacking the enemy and the officers and crews of which are duly authorized for the purpose by the Government to which they belong. It shall not be lawful for a ship to be invested with this character save before its departure from a national port, nor to be divested of it, save after return to a national port.' It was urged in support of this view that for a neutral to allow the conversion to take place in one of its ports would be an infraction of its neutrality, and for a belligerent to make the change within neutral waters would be a breach by a belligerent of his duties to a neutral, and that vessels so converted did not acquire the character of a regular ship of war. Against conversion on the high seas Lord Reay urged that as ships of war were accorded rights of search of neutral vessels, a neutral has the right to know what ships are authorized to exercise this right. If it be permitted to all ships which have left a neutral port as merchantmen to suddenly appear in a new character (and as the Japanese delegate pointed out the converse case would be equally possible) 'regrettable incidents' would be occasioned, complications in regard to breach of neutrality laws would occur and an intolerable situation would be created. The Dutch delegate supported the proposition to limit conversion to national ports. The United States & Japanese delegates also concurred with the addition of 'ports or territorial waters in the naval or military occupation' of the Power making the conversion.

"The delegates of Germany, Russia and France opposed these proposals and contended that such conversion was permissible on the high seas. They urged that there was no existing rule of international law against it, that as the laws of many states allowed the private property of nationals to be employed for operations of war, such states could exercise this right within territories under their jurisdiction and also on the high seas which are subject to the jurisdiction of no one Power. A prize captured from the enemy on the high seas, and suitable for conversion, could at once be turned into a ship of war by placing her under the command of an officer of the capturing ship and transferring to her a crew and if this is *ex hypothesi* allow-

able, it is equally allowable for a ship of war meeting a merchantman of its own state on the high seas to make a conversion in a similar manner. M. Renault (France) agreed that conversion must not take place in neutral ports or territorial waters but otherwise he supported the German and Russian point of view.

"The Italian delegate (Count Tornielli), * * * endeavored to bring about a compromise between the opposing views of Germany and Great Britain; he moved 'That ships which leave the territorial waters of their country *after* the opening hostilities cannot change their character either on the high seas or in the territorial waters of another state.' M. Fusinato (Italy) in supporting this proposal pointed out that it would be a serious matter for a merchant-ship which had enjoyed the right of entry of a neutral port to be able to take advantage of its commercial character there and immediately on reaching the high seas to throw it off. Such a proceeding was nothing less than an abuse of neutral hospitality. * * *

"The really important question [the place where conversion might occur] was therefore left undecided. A similar fate befell the attempt to settle the period of duration of the conversion. The Austro-Hungarian delegate proposed that a ship once converted could not be re-converted until the termination of the war * * *." This "was meant to prevent the not impossible case of a converted merchantman which had entered a neutral port as a ship of war, leaving and returning in a few hours having divested herself of her character on the high seas, for as was pointed out by the Japanese delegate, if conversion on the high seas is allowed, it would be equally possible for the act of re-conversion or divestment of the public character to take place there also. Lord Reay's proposition allowed the character of the converted ship to be divested only in a national port. * * *

"In this case, as in so many other questions discussed at the conference, the conflict of political interest was found to be too acute to allow of a settlement of a problem which, if it is allowed to remain in its present extremely unsatisfactory condition, will be certain on the outbreak of a naval war to bring about strained relations between the states which hold such divergent views. Every principle of the law of neutrality demands that the conversion of merchant-ships in neutral waters should be recognized as illegal; but there was not absolute unanimity even on this. The British proposal started with an endeavor to obtain the acceptance of such a definition of ships of war as would 'prove sufficient to prevent the issue by any Power of letters of Marque.' (British Instructions.) The Articles agreed to by the Conference have formulated principles which will have this effect. The Italian proposal was one which, while being wholly consistent with principle, allowed for the exceptional case of 'convertible' vessels which were on the high seas at the outbreak of war. This proposal, embodying the British, Japanese and American views, would have allowed the conversion of merchant-ships only in the national ports and territorial waters of the converting Power or in ports and territorial waters occupied by it. Conversion on the high seas would have been prohibited in the case of all ships leaving their national ports after the outbreak of war, but allowed in the case of those which left a port before the outbreak of war. If these proposals, and

the Austrian proposition that conversion when once effected should continue for the duration of the war, had been added to the rules adopted by the Conference, a valuable and important addition would have been made to the law of Nations. Neutral rights, wholly ignored by the Russo-German proposals, would have been safeguarded, and belligerents would have avoided the friction with neutrals which must inevitably take place so long as the present uncertainty exists. * * *

"The subject of the conversion of merchant vessels into war-ships on the high seas was examined at the Naval Conference" at London in 1909. "The conflicting views which were so strongly marked at the Hague recurred at that Conference. Similar arguments to those adduced at the Hague were again advanced by the delegates of the different states, but though all were agreed that it would be a great advantage to put an end to an uncertainty, all attempts to bring about an understanding were unsuccessful. States claiming an unrestricted right of conversion on the high seas 'refused to make any concessions or to abate one jot from the claim to the absolutely unfettered exercise of the right which its advocates vindicate as a rule forming part of the existing law of nations.' The British delegation declined to admit the right.

"At one point of the proceedings it appeared possible to come to an agreement on the subject of *re-conversion* so as to prevent a 'war-ship (generally a recently converted merchant vessel) doffing its character so as to be able to revictual or refit in a neutral port without being bound by the restrictions imposed on war-ships.' The delicate position of a neutral state in such circumstances was admitted. 'Agreement might perhaps have been reached on this proposal, but it seemed very difficult to deal with this secondary aspect of a question which there was no hope of settling as a whole * * *. The question of conversion on the high seas and that of re-conversion therefore remain open."

Higgins, pp. 315–321.

The decree of April 23, 1898, of the Spanish Government "declared that the Government would, for the purposes of cruising, organize a service of 'auxiliary cruisers of the navy,' composed of 'ships of the Spanish mercantile navy' and 'subject to the statutes and jurisdiction of the navy.'"

Moore's Digest, vol. 7, p. 542.

Report of Drafting Committee, London Conference.

"The program mentions under head (*f*): The legality of the conversion of a merchant vessel into a warship on the high seas. The conflicting views on this subject which became apparent at the conference of The Hague in 1907, have recurred at the present conference. It may be concluded, both from the statements in the memoranda and from the discussion, that there is no generally accepted rule on this point, nor do there appear to be any precedents which can be adduced. Though the two opposite opinions were defended with great warmth, a lively desire for an understanding was expressed on all sides; everybody was at least agreed that it would be a great advantage to put an end to uncertainty. Serious efforts were

made to do justice to the interests espoused by both sides, but these unfortunately failed. A subsidiary question dependent on the previous one, on which, at one moment it appeared possible to come to an agreement, is that of reconversion. According to one proposal it was to be laid down that 'merchant vessels converted into warships can not be reconverted into merchant vessels during the whole course of the war.' The rule was absolute and made no distinction as regards the place where reconversion could be effected; it was dictated by the idea that such conversion would always have disadvantages, would be productive of surprises, and lead to actual frauds. As unanimity in favor of this proposal was not forthcoming, a subsidiary one was brought forward, viz, 'The conversion of a warship into a merchant vessel on the high seas is forbidden during the war.'

"The case had in view was that of a warship (generally a recently converted merchant vessel) doffing its character so as to be able freely to revictual or refit in a neutral port without being bound by the restrictions imposed on warships. Will not the position of the neutral State between two belligerents be delicate, and will not such State expose itself to reproach whether it treats the newly converted ship as a merchant vessel or as a warship? Agreement might perhaps have been reached on this proposal, but it seemed very difficult to deal with this secondary aspect of a question which there was no hope of settling as a whole. This was the decisive reason for the rejection of all proposals.

"The question of conversion on the high seas and that of reconversion therefore remain open."

General report of drafting committee to London Naval Conference.

Views of British Government.

"No general practice of nations has prevailed in the past on this point [the conversion of merchant vessels into war-ships on the high seas] from which any principles can be deduced and formulated as the established rules of international law. So far as can be ascertained there are no precedents on the subject.

"The question is regarded by His Majesty's Government as one to be decided by reference to the rights of neutrals. Resistance on the part of a neutral merchant-vessel to the exercise of the admitted belligerent right of visit and search, involving as it does the possible condemnation of the vessel as good prize, is so serious a matter for the neutral, that it is essential that there should be no possibility of doubt as to the ships that are entitled to exercise this right. It is submitted that the true rule to be deduced from the principles which govern the relations between belligerents and neutrals is that the exercise of the right to visit and bring in neutral merchant-vessels is strictly limited to ships being, and known to be, public ships of the belligerent fighting fleet flying the pennant. It would be a grave extension of that right if it were held to be permissible to exercise those powers by means of vessels, believed by neutrals to be peaceful merchant-vessels, suddenly and without warning converted into ships of war, possibly in the immediate neighbourhood of vessels which they desire to stop and search. Any further limitation to the security of peaceful commerce or of the freedom of neutral vessels to navigate the seas is opposed to the general interests of nations, while

the exercise of belligerent force against neutrals in the manner indicated above would almost inevitably lead to friction, with the attendant danger of bringing other nations into the arena of war. The somewhat arbitrary powers accorded to belligerents as against neutrals for the protection of the vital interests of the former should not, it is submitted, be increased by according sanction to proceedings which, however they may be argumentatively sustained, are entirely novel and without the support of any existing principles of international law. His Majesty's Government, therefore, regard it as of great importance to neutrals that units of the fighting force of a belligerent should not be created except within the jurisdiction of that Power.

"The only cases decided in the British Prize Courts, where any point of this kind has arisen, are some decisions on the rights of the original British owners of ships, which had been captured by the enemy, to restitution of their property on its subsequent recapture by the British forces. [The *Ceylon*, 1 Dod. 105; The *Georgiana*, 1 Dod. 397.]. The British Prize Act deprived the original owner of his right to restitution, if the vessel had been set forth as a ship or vessel of war. These cases deal only with the rights of the respective groups of British claimants, as determined by the Act of Parliament, and have, therefore, little or no bearing on the general question."

Memorandum of views of British Government as to rules of International Law on points enumerated in the programme of the London Conference. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 10.

Views of British Government.

"37. The conditions under which merchant-ships may be converted into war-ships were much debated at the second Peace Conference, and on a number of points an agreement was reached, which was finally embodied in one of the conventions annexed to the final act of the conference. In regard to one important point, however, namely, as to whether such conversion could be legally effected on the high seas, it was found impossible to arrive at any understanding. The preamble of the convention referred to accordingly recites that—

'Whereas the Contracting Powers have been unable to come to an agreement on the question whether the conversion of a merchant-ship into a war-ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected, remains outside the scope of this agreement, and is in no way affected by the following rules * * *.'

"38. In the presence of this clearly recorded divergence of views it is not possible to expect that the forthcoming conference could bring about agreement as to the existing law, but His Majesty's Government earnestly hope that means will be found to frame a common rule to which the principal naval Powers will bind themselves to conform in future. Such a rule must obviously be in the nature of a compromise, and it would have to be established by way of a convention. Apart from the important question of principle involved, there are two practical considerations which have chiefly weighed with His Majesty's Government in refusing to recognize the right to convert merchant-vessels into ships of war on the high seas. One is the facility which such a right would give to the captain of a merchant-vessel qualified to act as a war-ship, to seize enemy or neu-

tral ships without warning. The other is that enemy vessels under the mercantile flag, but suitable for conversion, would be able, as merchantmen, to claim and obtain in neutral ports all the hospitality and privileges which would, under the accepted rules of naval warfare, be denied to them if they were war-ships. Availing herself of these advantages, such a vessel, found in distant waters after the outbreak of hostilities, would be enabled to pass from one neutral port to another until she reached the particular point in her voyage where she might most conveniently be converted into a commerce destroyer. These difficulties might be met by restricting the right of conversion on the high seas to the case of vessels which had previously been specifically and publicly designated by the respective governments as suitable for the purpose and borne on their navy lists; and by subjecting such vessels, while in neutral ports, to the same treatment as belligerent men-of-war. But any other suggestions which may be made in the desired direction, His Majesty's Government will be ready to examine sympathetically."

Instructions, December 1, 1908, from Sir Edward Grey to Lord Desart, British delegate to the London Conference. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 31.

Report of British Delegates to London Conference.

"36. The one subject of the programme which has found no mention in the [London] Declaration is the conversion of merchant-vessels into men-of-war on the high seas. The question is one of those which had been left unsolved by the second Peace Conference, and so decided was the division of opinion subsequently revealed by the memoranda exchanged by the several governments before the meeting of the present Naval Conference, that it had been found impossible to state, in the shape even of a mere Basis of Discussion, an underlying general principle commonly accepted. In our instructions the hope was nevertheless expressed that some means might be found of reconciling the opposing views and to unite on the basis of a compromise, for which we were allowed a fairly wide discretion. We regret, however, that, in this instance, all our efforts in bringing about an understanding were unsuccessful. We did not fail to put forward the arguments which, in the view of His Majesty's Government, militate against the recognition of an unrestricted right of conversion on the high seas, and we endeavoured in vain to obtain, in return for a recognition of such right subject to proper limitation, some guarantees against the abuses to which it appears to be obviously liable. We were met with a refusal to make any concessions or to abate one jot from the claim to the absolutely unfettered exercise of the right, which its advocates vindicate as a rule forming part of the existing law of nations. In these circumstances we felt that we had no option but to decline to admit the right, and the result is that the question remains an open one."

Report, March 1, 1909, of the British delegates at the Naval Conference to Sir Edward Grey, British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 101.

The place where the conversion covered by Hague VII, 1907 may take place is left open. The preamble to this Convention recites: "Whereas, however, the contracting powers have been unable to come to an agreement on the question whether the conversion of a

merchant ship into a warship may take place on the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules."

This Convention as "finally agreed upon relates to vessels which *have already been converted* into war vessels rather than to their conversion."

International Law Discussions, United States Naval War College, 1912, pp. 169, 170.

"It is suggested that this Convention should be entitled 'A Convention to secure the observance of the Declaration of Paris in regard to privateering.'"

Higgins, p. 312, International Law Discussions, United States Naval War College, 1912, p. 170.

Article 1, Hague VII, 1907, substantially appears as Art. 3 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

In the case of the *Ceylon* (1811) (1 Dod. 105, 2 Roscoe, 133), Sir William Scott considered a question somewhat similar to the one involved in H VII, 1907, Art. 1. The British Prize Act (45 Geo. III, c. 72), allowed salvage in the case of recapture of British merchant vessels except such as had been "set forth as ships or vessels of war by the enemy." With reference to this language Sir William Scott said: "'Setting forth' does not, I think, necessarily mean sending out of port. It is no necessary part of the interpretation that she should have been carried into port and sent out with a formal and regular commission; it is sufficient if she has been used in the operations of war, and constituted a part of the naval and military force of the enemy. *Non constat* that there was not a regular commission of war in the present case; that must remain matter of conjecture only, since all the ship's papers are lost. I hold it, however, to be unnecessary that she should have been regularly commissioned; it is enough that she was employed in the public military service of the enemy by those who had competent authority so to employ her. In the case of *Costor* [Lords of Appeal, May, 1795], which ship was not carried into port, there was no regular commission, for it was not in the power of the admiral to grant a regular commission; he has only an inchoate authority for such a purpose, and his acts necessarily require confirmation; yet in that case, it was held that the ship, though commissioned by the admiral alone, was sufficiently clothed with the character of a vessel of war. A commission of war is conclusive of itself as to the character of a ship; but it by no means follows that a regular and formal commission is in all cases indispensable. The want of such an instrument is not fatal; it may be supplied in various ways by acts equivalent to a commission."

The legal status of one of the vessels of the International Navigation Company, the S. S. *City of Paris*, renamed the U. S. S. *Yale*, taken over by the United States during the Spanish-American War, under the provisions of the Act of March 3, 1891 (26 Stat., 830), was considered by a United States Court in determining the question whether the civilian crew were entitled to share in the distribution of

the prize money arising out of the capture of the *Rita*, an enemy merchant vessel. In this case (1898) (89 Fed. 763), the court said:

"By a charter party and supplementary agreement entered into April 30, 1898, between the company and the government * * * possession of the ship was transferred to the government. By it she was heavily armed, and converted into an auxiliary cruiser, and her name changed. The charter party provided that the ship should be 'manned, victualed, and supplied at the expense of the charterer,' which is also to pay all other expenses whatsoever, and return the same in good repair, less ordinary wear and tear, at the termination of the chartering which was to be at the will of the charterer. The supplementary agreement provided that the ship was 'to be manned by her regular officers and crew, and in addition thereto was to take on board two naval officers, a marine officer, and a guard of thirty marines, and was to be victualed and supplied with two months' provisions, and about four thousand tons of coal; the actual cost to the owners of such additional equipment and services to be reimbursed by the charterer upon bills to be certified by the senior naval officer on board.' There were also provisions protecting the owner against all expenses and liability, and a provision that during the continuance of the supplementary agreement the steamship was to be 'under the entire control of the senior naval officer on board.' * * *

"The evidence fully established the fact that the petitioner Watkins and others of the crew of the *City of Paris*, mentioned in his petition, although not formally enlisted, were 'doing duty on board and borne upon the books.' They were charged with the navigation of the ship. There was no other crew on board capable of performing that service. From them was selected the prize master and crew which brought the *Rita* into port for condemnation. If they were not 'in the service' of the government while performing that mission, they incurred the hazard of being considered as pirates."

The court held that the civilian crew were entitled to share in the prize money.

CONVERTED MERCHANT SHIPS TO BE MARKED EXTERNALLY AS ARE OTHER WAR-SHIPS OF THEIR NATIONALITY.

Merchant ships converted into war-ships must bear the external marks which distinguish the war-ships of their nationality.—*Article 2, Hague VII, 1907.*

"ARTICLE 4. Vessels converted into warships must bear the exterior marks which distinguish the warships of their nationality."

Institute (1913), p. 176.

"2. * * * The necessary distinctive features of vessels of war are.—War flag (together with the pennant, as a rule), commander commissioned by the state, whose name appears in the navy list, and military disciplined crew. * * *"

German Prize Rules, 1909.

Article 2, Hague VII, 1907, substantially appears as Art. 4 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

COMMANDERS OF CONVERTED MERCHANT SHIPS TO BE DULY COMMISSIONED AND NAMED AMONG OFFICERS OF FIGHTING FLEET.

The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.—*Article 3, Hague VII, 1907.*

"Article 5. The commander must be in the service of the State and duly commissioned by the competent authorities; his name must appear on the list of officers of the fighting fleet."

Institute (1913), p. 176.

Article 3, Hague VII, 1907, appears as Art 5 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The crew must be subject to military discipline.—*Article 4, Hague VII, 1907.*

"ARTICLE 6. The crew must be subject to the rules of military discipline."

Institute (1913), p. 176.

Article 4, Hague VII, 1907, appears as Art. 6 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"2. These vessels [naval auxiliaries] shall be governed by the laws of the United States, by the Navy Regulations, and Naval Instructions as far as they may be applicable, and by these regulations."

United States Naval Auxiliary Service Regulations, 1914.

Every merchant ship converted into a war-ship must observe in its operations the laws and customs of war.— *Article 5, Hague VII, 1907.*

"ARTICLE 7. Every vessel converted into a warship must observe in its operations the laws and customs of war."

Institute (1913), p. 176.

ARTICLE 5, Hague VII, 1907, appears as Art 7 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

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CONVERSION OF MERCHANT SHIPS TO BE ANNOUNCED IN LIST OF WAR-SHIPS AS SOON AS POSSIBLE.

A belligerent who converts a merchant ship into a war-ship must, as soon as possible, announce such conversion in the list of war-ships.—*Article 6, Hague VII, 1907.*

"ARTICLE 8. The belligerent who converts a vessel into a warship must, as soon as possible, announce such conversion in the list of warships."

Institute (1913), p. 176.

"112. The Captain is authorized to employ a ship which has been captured as hostile under 10 to 16, as an auxiliary vessel, or, if its sending in seems not to the purpose or unsafe, to destroy it. The same holds for a ship captured under 56, if it is certain that an unneutral service of serious nature can be proved before the prize court.

"The conversion into a man-of-war is connected with the requirements of Convention VII, 2nd Hague Conference."

German Prize Rules, 1909.

"148. If the public interest requires, you may rearm captured enemy vessels and employ them for the needs of the service, after having drawn up, so far as possible, a summary inventory of them, with valuations."

"149. You may likewise utilize, for the service of the fleet, the cargoes of enemy vessels, after having made a detailed inventory thereof, with values."

"150. You likewise have a right to act in this way with the supplies of the vessel, especially fuels and fats."

"151. The reports drawn up in execution of these provisions must be attached to the dossier of the prize; a duplicate thereof shall be addressed to the Minister of the Navy, and another to the captain of the captured vessel."

French Naval Regulations, 1912.

Article 6, Hague VII, 1907, substantially appears as Art. 8 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

MILITARY HOSPITAL SHIPS DEFINED—TO BE RESPECTED AND FREE FROM CAPTURE, AND NOT SUBJECT TO LIMITATIONS IMPOSED UPON WAR-SHIPS REGARDING STAY IN NEUTRAL PORTS.

Military hospital ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and can not be captured while hostilities last. These ships, moreover, are not on the same footing as war-ships as regards their stay in a neutral port.—*Article 1, Hague X, 1907.*

Article 1, Hague X, 1907, is substantially identical with Article 1, Hague III, 1899.

"Art. IX. The military hospital ships remain under martial law in all that concerns their stores; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

"The vessels not equipped for fighting, which, during peace, the government shall have officially declared to be intended to serve as floating hospital ships, shall, however, enjoy during the war complete neutrality, both as regards stores, and also as regards their staff, provided their equipment is exclusively appropriated to the special service on which they are employed."

Geneva Convention, 1868.

At an International Conference that met at the Hague in 1904, "for the purpose of defining the status of hospital ships when entering neutral ports," the following articles were adopted:

"ARTICLE 1.—Hospital ships, concerning which the conditions set forth in Articles 1, 2 and 3 of the Convention concluded at the Hague on July 29, 1899, for the adaptation to Maritime Warfare of the principles of the Geneva Convention of August 22, 1864, are fulfilled shall be exempted in time of war from all dues and taxes imposed on vessels for the benefit of the State in the ports of the Contracting Parties.

"ARTICLE 2.—The provision of the foregoing article does not prevent the application by means of visitation or other formalities of the fiscal or other laws in force at said ports.

"ARTICLE 3.—The rule laid down in article first is binding only on the contracting Powers in case of war between two or more of them.

The said rule shall cease to be binding from the time when a non-Contracting Power shall join one of the belligerents in a war between Contracting Powers."

This Convention was signed by the representatives of a number of countries, including Germany, Austria-Hungary, the United States, France, Italy, Japan, and Russia. Great Britain took no part in the Conference.

Treaties, &c., of United States, Malloy, vol. 2, 2135.

"ARTICLE 41. * * * *Hospital ships.*—Military hospital-ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last. * * *"

Institute (1913), p. 183.

"ARTICLE 49. *Suspension of immunities.*—The exceptions considered in Articles 41 * * * cease to be applicable if the vessels to which they refer participate in the hostilities in any manner whatsoever or commit other acts which are forbidden to neutrals as unneutral service.

"The same suspension occurs if, summoned to stop to submit to search, they seek to escape by force or by flight."

Institute (1913), p. 186.

An attempt was made at Geneva in 1868 to remedy some of the deficiencies of the Geneva Convention of 1864 and to extend its provisions to maritime warfare; but the articles drawn up were never ratified. "The Hague Conference of 1899 produced a Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare. It also proclaimed in its Regulations for the conduct of war on land that 'the obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22d of August, 1864, subject to any modifications which may be introduced into it.' The expected modifications were made in 1906, when the representatives of thirty-seven powers met at Geneva, and produced a new, more effective, and more elaborate Geneva Convention. The Hague Conference of the following year repeated the declaration of its predecessor as to the obligations of belligerents towards the sick and wounded in land warfare, with the difference that it spoke of 'the Geneva Convention' instead of dating and defining it, and alluding to possible modifications. The Geneva Convention referred to is that of 1906, and therefore all powers accept it who accept the military code drawn up by the Second Peace Conference. The Conference revised and improved the Convention of 1899, which extended the principles of the Geneva Convention to war at sea."

Lawrence, p. 405.

At the outbreak of the Spanish-American War the following instructions were issued by the United States Navy Department in respect to the U. S. S. *Solace* that was fitted out for use as a military hospital ship:

"The *Solace* having been fitted and equipped by the Department as an ambulance ship for the naval service under the terms of the Geneva Convention is about to be assigned to service.

"The Geneva Cross flag will be carried at the fore whenever the national flag is flown.

"The neutrality of the vessel will, under no circumstances, be changed, nor will any changes be made in her equipment without the authority of the Secretary of the Navy.

"No guns, ammunition, or articles contraband of war, except coal or stores necessary for the movement of the vessel, shall be placed on board; nor shall the vessel be used as a transport for the carrying of despatches, or officers or men not sick or disabled, other than those belonging to the medical department.

"Information as to the special work for which the *Solace* is intended will be communicated to the commander in chief of the squadron by the Department."

Navy General Order No. 487, April 27, 1898. Treaties, &c., of the United States. Malloy, vol. 2, 1917.

"ART. 21. Military hospital ships—that is to say, vessels constructed or fitted out by the belligerent States for the special and sole purpose of assisting the wounded, sick, or shipwrecked, and whose names have been communicated to the respective Powers at the opening or in the course of hostilities, and in any case before they are so employed, shall be respected, and are not liable to capture during the period of hostilities.

"Such ships shall not be classed with warships, with respect to the matter of sojourn in a neutral port."

United States Naval Code, 1900.

"6. Exempt from seizure are:—

(a) Hospital ships, etc., according to convention X of the 2d Hague Conference:" * * *

German Prize Rules, 1909.

"17. You will act in conformity with the provisions of the Hague Convention of October 18, 1907, for the adaptation to maritime warfare of the principles of the Geneva Convention with respect to the hospital ships mentioned in Articles 1, 2 and 3 of that Convention and a list of which is furnished you elsewhere; under reservation of the rights and duties flowing from Articles 4, 7, 8, 9, 10, 12 and 14 on the one hand and on the other hand Articles 7, 8, 9, 10, 11, 16 and 17 of that Convention. You are yourself to judge of the proper time to make use of your rights in the various cases referred to by the said Convention."

French Naval Regulations, 1912.

Article 1, Hague X, 1907, substantially appears as Art. 103 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

HOSPITAL SHIPS EQUIPPED BY PRIVATE INDIVIDUALS OR RELIEF SOCIETIES, HOW TREATED.

Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.—*Article 2, Hague X, 1907.*

Article 2, Hague X, 1907, is substantially identical with Article 2, Hague III, 1899.

"ART. 13. Hospital ships, equipped at the expense of associations for the aid of the wounded recognized by the Governments which have signed this Convention, being provided with a commission issued by the sovereign, who shall have expressly authorized their fitting out, and with a document from a competent maritime authority, certifying that they have been submitted to its control during their fitting out and at their final departure, and that they were then appropriated exclusively to the object of their mission, shall be considered as neutral as well as all the persons employed in them.

"They shall be respected and protected by the belligerents."

Geneva Convention, 1868.

"ARTICLE 42. Hospital-ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall likewise be respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

"These ships must be provided with a certificate from competent authorities declaring that the vessels have been under their control while fitting-out and on final departure.

"The ships in question shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half (five feet) in breadth.

"They are subject to the regulations laid down for military hospital-ships by Article 41."

Institute (1913), p. 184.

"ARTICLE 49. *Suspension of immunities.*—The exceptions considered in Articles * * * 42 * * * cease to be applicable if the vessels to which they refer participate in the hostilities in any manner whatsoever or commit other acts which are forbidden to neutrals as unneutral service.

"The same suspension occurs if, summoned to stop to submit to search, they seek to escape by force or by flight."

Institute (1913), p. 186.

"ART. 22. Hospital ships fitted out, in whole or in part, at the expense of private individuals, or of officially recognized relief societies, shall likewise be respected and exempt from capture, provided the belligerent Power to whom they are subject has given them an official commission and has notified the hostile Power of the names of such ships at the beginning or in the course of hostilities, and in any case before they are employed.

"These ships should be furnished with a certificate, issued by the proper authorities, setting forth that they were under the control of such authorities during their equipment and at the time of their final departure."

United States Naval Code, 1900.

Article 2, Hague X, 1907, substantially appears as Art. 104 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

HOSPITAL SHIPS EQUIPPED BY PRIVATE INDIVIDUALS OR SOCIETIES OF NEUTRAL COUNTRIES, HOW TREATED.

Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their names to his adversary at the commencement of or during hostilities, and in any case, before they are employed.— *Article 3, Hague X, 1907.*

Article 3, Hague III, 1899, provided that these hospital ships were to be exempt from capture "if the neutral Power to whom they belong has given them an official commission and notified their names to the belligerent Powers at the commencement of or during hostilities, and in any case before they are employed."

"Article 3 * * * modifies Article 3 of the Convention of 1899. The majority of the Commission has in fact adopted an amendment proposed by the German delegation and suggested by Article 11 of the Convention of 1906. To understand the difficulty arising here we must compare the case contemplated by the latter Convention with the analogous case occurring in naval warfare. When a relief society of a neutral country wishes to come to the aid of one of the belligerents in land warfare, subject to what conditions may it do so? Such a society must first obtain the consent of the Government of its own country, and then the consent of the belligerent which it wishes to help and under whose direction it must place itself. It will temporarily form a part of the sanitary service of the belligerent, as is shown by the obligation imposed by Article 22, paragraph 1 [1906], to fly the national flag of this belligerent beside the flag of the Red Cross.

"In 1899, when the question arose as to the status of hospital ships of neutral countries disposed to lend their charitable aid, no precedents existed as the Convention of 1864 had not provided for the case of neutral ambulances. Until the Convention of 1906 it was a disputed question whether such ambulances could fly their national flag or whether they should fly that of the belligerent. In this connection the Committee in 1899 expressed its view as follows:

"'There was some thought of requiring neutral hospital ships to place themselves under the direct authority of one or other of the belligerents, but careful study has convinced us that this would lead to serious difficulties. What flag would these ships fly? Would it

not be somewhat inconsistent with the concept of neutrality for a ship with an official commission to be incorporated in the navy of one of the belligerents? It seemed to us sufficient to have these vessels, which are primarily under the control of the Government from which they have received their commissions, subjected to the authority of the belligerents to the extent provided in Article 4.'

"Certain members of the Commission believe that these reasons have retained all their force. They feel that the text of Article 11 of the Convention of 1906 is not sufficient to invalidate them. A neutral ambulance wishing to assist in the hospital service of a belligerent must by the very nature of the circumstances be incorporated in that service; it is hard to imagine its being free from control within the lines of the belligerent, who must be responsible to his adversary for its acts and who should consequently have authority over it. The case seems to be different for a neutral hospital ship, as it operates on the open sea where it enjoys an independence of action which an ambulance can not possess. It is further said that a neutral hospital ship may intend to help one belligerent no more than the other, but may proceed to the vicinity of the naval operations ready to assist both parties and that this presents no inconvenience because belligerents have means at their disposal to prevent any abuses that might accompany the charitable assistance.

"This reasoning did not convince the majority of the Commission, which voted in favor of modifying Article 3, so as to bring it into accord with Article 11 of the Convention of 1906. Military considerations, it is said, require this provision, in that if independent action were allowed the neutral hospital ship, a way would be open to serious abuses which Article 4 does not contemplate and could not check.

"This is the reason why the Commission proposes a modification of Article 3, to conform to the convention of 1906. This Article 3 refers solely to the obligation for the neutral hospital ship to place itself at the service (hospital service, of course) of one of the belligerents. Paragraph 4 of the new Article 5 makes the logical application of this provision respecting the flag to be flown upon the neutral ship so employed. It is worth while to note that the text there is not, whatever may be said, in perfect harmony with Article 11 of the Convention of 1906, in accordance with which a neutral ambulance displays *two flags*—that of the Geneva Convention and that of the belligerent—for the new paragraph of the fifth Article provides that the ship shall carry *three flags;* the flag of the Geneva Convention, its own national flag, and besides, the flag of the belligerent displayed at the mainmast. We know of no precedent to this effect. The text proposed by the German delegation has been changed because it was thought unnecessary to require that the hospital ship *place itself in the service of the belligerent;* it is enough that it place itself *under its control.*"

Reports to the Hague Conferences, pp. 716, 717.

"ART. X. Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality, but the mere fact, noted on the ship's books, of the vessel having been visited by an enemy's cruiser, renders the sick and wounded incapable of serving during the continuance of the war.

The cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation.

"If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerents.

"The belligerents retain the right to interdict neutralized vessels from all communication, and from any course which they may deem prejudicial to the secrecy of their operations. In urgent cases special conventions may be entered into between commanders-in-chief, in order to neutralize temporarily and in a special manner the vessels intended for the removal of the sick and wounded."

Geneva Convention, 1868.

"ART. 11. A recognized society of a neutral state can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof."

Geneva Convention, 1906.

"ART. 22. The sanitary formations of neutral countries which, under the conditions set forth in article 11, have been authorized to render their services, shall fly, with the flag of the convention, the national flag of the belligerent to which they are attached."

Geneva Convention, 1906.

"The hospital ships fitted out by private individuals or societies of neutral nationality must be placed under the control of one of the belligerents with the previous consent of their own government and the authorization of the belligerent government. But though private hospital ships are thus, like public hospital ships, subject to the direction of the naval commanders, and unable to wander from fleet to fleet at the will of their owners, they are to assist the wounded, sick, and shipwrecked, without distinction of nationality, and the same obligation is laid on their public compeers."

Lawrence, pp. 409, 410.

"ARTICLE 3 [Hague X, 1907,] contains modifications of the corresponding Article of the Convention of 1899, based on Article 11 of the Geneva Convention of 1906. The Conference of 1899 left unsettled the relations which should exist between neutral hospital ships and belligerents. The question was also raised as regards the flag which such ships ought to fly. In 1907 similar difficulties were experienced by some members of the Committee who felt that the text of Article 11 of the Convention of 1906 was not enough to remove them. The difference in the circumstances under which aid is rendered by a neutral ambulance in land warfare and a neutral hospital ship in naval warfare was felt by some of the Committee to call for different treatment, as hospital ships enjoy greater freedom of action than the neutral ambulances can claim in land warfare. The majority of the Committee considered that, for reasons of military necessity, it was inadvisable to allow neutral hospital ships to operate apart from the special authorisation of one of the belligerents, the view that such

ships might desire to aid both belligerents indiscriminately being inacceptable on the ground that to allow complete independence of action to such neutral ships would leave the way open to serious abuses. The alteration in Article 3 now requires such ships to be placed under the control of one of the belligerents, after having received the previous consent of the neutral government. Such ships will henceforth form part of the sanitary service of the belligerent and be placed under his direction. The Report of M. Renault points out that this Article and Article 5 are not quite in harmony with Articles 11 and 22 of the Geneva Convention of 1906; under the latter a neutral ambulance flies two flags, that of the Geneva Convention and that of the belligerent to whose army it is attached, but the neutral hospital ship must fly three flags, namely the two mentioned as well as its own national (neutral) flag. The German draft proposed that neutral hospital ships should be placed *au service* of one of the belligerents, but on the proposition of M. Van den Heuvel (Belgium) this expression was altered to *sous la direction* which was deemed to be less stringent."

Higgins, p. 383.

In the memorandum of Rear Admiral (then Captain) Stockton, U. S. N., transmitting the preliminary draft of the United States Naval Code promulgated on June 27, 1900 (G. O. No. 551, Navy Dept., Washington), the following statement is found:

"The Geneva-Hague additional articles [H. III of 1899] for the amelioration of warfare at sea, on the lines of the Geneva Convention, have been incorporated in the Naval Code [Arts. 21–29, inc.], with the exception of Article 3 [H III of 1899], which is omitted, and of Article 6 [H III of 1899], which is modified [See Art. 25 U. S. Naval Code]. The presence of these two articles prevented the adoption of the additional articles, as a whole, by the representatives of the United States. It is believed that the possibilities of the South African war have justified Captain Mahan's views as to Article 3 [H III of 1899]. If it had been a maritime war we might have seen sympathetic neutral hospital ships of different countries arrayed on opposite sides, and even hospital ships of the same neutral country so opposed, in accordance with the sympathies of the contributors. Probably from the United States would have come two or more antagonistic hospital ships, fitted out by sympathizers having opposing opinions as to the merits of the war. It can readily be imagined what confusion and complications might follow—all the articles would have been discredited."

International Law Discussions, United States Naval War College, 1903, p. 6.

The interpretation placed by France and England on Article X of the Geneva Convention of 1868 is as follows:—"The question being raised as to whether, under Article X, a vessel might not avail herself of the carrying of sick or wounded to engage with impunity in traffic otherwise hazardous under the rules of war, it was agreed that there was no purpose in the articles to modify in any particular the generally admitted principles concerning the rights of belligerents; that the performance of such services of humanity could not be used as a cover either for contraband of war or for enemy mer-

chandise; and that every boat which or whose cargo would, under ordinary circumstances, be subject to confiscation can not be relieved therefrom by the sole fact of carrying sick and wounded.

"Question being raised as to whether, under Article X, an absolute right was afforded to a blockaded party to freely remove its sick and wounded from a blockaded town, it was agreed that such removal or evacuation of sick and wounded was entirely subject to the consent of the blockading party. It should be permitted for humanity's sake where the superior exigencies of war may not intervene to prevent, but the beseiging party might refuse permission entirely."

Moore's Digest, vol. 7, p. 375.

Article 3, Hague X, 1907, substantially appears as Art. 105 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The ships mentioned in Articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

The Governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log of the hospital ships the orders which they give them.— *Article 4, Hague X, 1907.*

"Article 4 is not changed. It seems to have provided the belligerents with sufficient powers to prevent abuses."

Reports to the Hague Conferences, p. 717.

"Art. 13. * * * These ships [hospital-ships] shall bring aid and assistance to the wounded and shipwrecked belligerents, without distinction of nationality.

"They ought not in any way to embarrass the movements of the combatants.

"During and after an engagement they shall act at their own risk and peril.

"The belligerents shall have over them the right of control and visit; they may refuse their assistance, may enjoin them to remove to a distance and may detain them, if the gravity of the circumstances require it."

Geneva Convention, 1868.

"ARTICLE 41. * * * These ships [hospital] cannot be used for any military purpose.

"They must in nowise hamper the movements of the combatants.

"During and after an engagement, they will act at their own risk and peril.

"The belligerents shall have the right to control and search them, they can refuse to help them, order them off, make them take a certain course, and put a Commissioner on board; they can even detain them, if important circumstances require it.

"As far as possible, the belligerent shall enter in the log of the hospital-ships the orders which they give them. * * *."

Institute (1913), p. 184.

"Article 81. H. *Wounded, sick, shipwrecked and dead.* Vessels used for hospital service shall afford relief and assistance to the wounded, sick and shipwrecked of the belligerents without distinction of nationality.

Institute (1913), p. 193.

"Article 82. In case of the capture or seizure of an enemy vessel or a hospital ship that has failed in its duty, the sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by their captors."

Institute (1913), p. 193.

"Art. 23. The vessels mentioned in articles 21 and 22 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

"It is strictly forbidden to use these vessels for any military purpose.

"These vessels must not in any way hamper the movements of the combatants.

"During and immediately after engagements they act at their own risk and peril.

"The belligerents have the right to control and visit such vessels: they may decline their cooperation, require them to withdraw, prescribe for them a fixed course, and place a commissioner on board; they may even detain them, if required by military necessity.

"When practicable, the belligerents shall enter upon the log of hospital ships such orders as they may give them."

United States Naval Code, 1900.

Article 4, Hague X, 1907, substantially appears as Art. 106 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

HOSPITAL SHIPS, THEIR BOATS AND SMALL CRAFT USED FOR HOSPITAL WORK, HOW DISTINGUISHED BY PAINTING—FLAGS THEY FLY.

Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.

The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital ships which, in the terms of Article 4, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.—*Article 5. Hague X. 1907.*

"Article 5 is retained for the most part. Its purpose is to indicate how hospital ships shall make themselves recognizable.

"A modification of the fourth paragraph and the addition of two new paragraphs are to be noted.

"The modification has been explained above in connection with the status created by the draft for neutral hospital ships. If the plan adopted by the Commission be not retained by the Conference, it would be necessary to return to the text of the Convention of 1899.

"The new paragraph 5 is intended to apply the provision of Article 21, paragraph 2, of the Convention of 1906, to the matter of which we treat. That provision reads as follows: 'Sanitary formations which have fallen into the power of the enemy shall fly no other flag than that of the Red Cross so long as they continue in that situation.' The situation is not identical in the case of a hos-

apprehensive of various possible dangers which might arise as the result of such a contrivance being availed of by an unprincipled enemy.' Objections were also raised in Committee to the German proposal which made the carrying of distinctive lights obligatory. A light on a hospital ship may betray the presence of the fleet, and hospital ships must conform to the order for 'lights out' in the same way as the ships under a belligerent's command. During the Japanese attack off Genzan, Korea, even the slightest sign of light was prohibited. 'Though almost intolerable for the sick and wounded, especially in the hot season, to have windows and apertures shut up, yet under such circumstances the directions of the authorities should be observed.' A warship might also make illicit use of the lights to effect its escape. The Convention leaves the steps which hospital ships and their boats are to take to ensure freedom from interference to be regulated by the belligerent by the special painting being rendered sufficiently plain. This is possible by means of phosphorescent paint or the employment of electric reflectors in case of attack."

Higgins, p. 384.

"ART. 24. Military hospital ships shall be distinguished by being painted white outside, with a horizontal band of green about $1\frac{1}{2}$ meters wide.

"The ships designated in article 22 shall be distinguished by being painted white outside, with a horizontal band of red about $1\frac{1}{2}$ meters wide.

"The boats of hospital ships, as well as small craft that may be devoted to hospital service, shall be distinguished by being painted in the same colors.

"Hospital ships shall, in general, make themselves known by hoisting, with their national flag, the white flag with a red cross prescribed by the Geneva Convention."

United States Naval Code, 1900.

Article 5, Hague X, 1907, substantially appears as Art. 107 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

"ARTICLE 41. * * * Military hospital-ships shall be distinguished by being painted white outside with a horizontal band of green about a metre and a half (five feet) in breadth.

"The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

"All hospital-ships shall make themselves known by hoisting, with their national flag, the white flag with the red cross provided by the Geneva Convention.

"The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the belligerent they are accompanying, take the measures necessary to render their special painting sufficiently plain. * * *

"Hospital-ships which, under the terms of this Article, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong."

Institute (1913), p. 183.

"ARTICLE 42. Hospital-ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies * * * shall be distinguished by being painted white outside with a horizontal band of red about a metre and a half (five feet) in breadth."

Institute (1913), p. 184.

Distinguishing Marks at Night.

"The question how best to secure at night for hospital ships the immunities to which they are entitled is very difficult. It is obvious that the display of a light by any of them might betray to the enemy the whereabouts of a squadron advancing to the attack, or in hiding, or endeavoring to slip away in the darkness. The same remark applies to any kind of luminous paint. The Conference decided that no measure that might be suggested for making plain in the night the special painting of hospital ships should be adopted without the assent of the belligerent whom they were accompanying. It is to be presumed that no commander would allow them to jeopardize the success of an important nocturnal enterprise."

Lawrence, p. 410.

Emblems of Non-Christian States.

"Although in this connection the red cross is especially stipulated as the distinctive emblem, there is no objection to the use by non-Christian States, who object to the cross on religious grounds, of another emblem. Thus Turkey reserved the right to use a red crescent, and Persia to use a red sun."

Oppenheim, vol. 2, p. 259.

Distinctive Lights.

With reference to the last paragraph of this article Higgins says that the question of a hospital ship carrying distinctive lights as proposed by the German delegation "had been raised during the Russo-Japanese War. Russia notified to Japan * * * that she proposed to use by night three vertical lights for her hospital ships—white, red, white—but the Japanese Government declined to accept these distinguishing marks as conferring special privileges, 'being

In the case of a fight on board a war-ship, the sick wards shall be respected and spared as far as possible.

The said sick wards and the matériel belonging to them remain subject to the laws of war; they can not, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.—*Article 7, Hague X, 1907.*

"Article 7, which is new, provides for a situation analogous to that covered by Articles 6 and 15 of the [Geneva] Convention of 1906, but rarer nowadays, at least, in naval warfare than in war on land. A slight misunderstanding arose with regard to the amendment of the German delegation, which read: '*During the fight* the sick-wards on board the war vessels shall be respected and spared as far as possible.' At first only fights at a distance were thought of, as these are by far the more frequent, and naturally it was hard to understand how during such fights the sick-wards could be respected. But the provision refers to a fight on board, which makes it perfectly comprehensible. A slight modification in the phrasing of the amendment sufficed to dispel this obscurity."

Reports to the Hague Conferences, p. 718.

"ART. 6. Mobile sanitary formations (*i. .e*, those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.

Geneva Convention, 1906.

"ART. 15. Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but can not be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of important military necessity, if, before such use, the sick and wounded who are in them have been provided for."

Geneva Convention, 1906.

"ARTICLE 43. In case of a fight on board a war-ship, the sick-wards and the *matériel* belonging to them shall be respected and spared as far as possible. Although remaining subject to the laws of

war, they cannot be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded. The commander into whose power they have fallen may, however, apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for."

Institute (1913), p. 184.

"The sick-bays of warships cannot be protected from the effects of shot or shell fired from a distance at the ship of which they form a part: but it is provided that, if a fight takes place on board, they are to be respected and spared as far as possible."

Lawrence, p. 410.

"It is not to be expected that in engagements where the combatants remain at a distance from each other the sick-bays can be respected, and the text of the Article makes it clear that it only refers to conflicts taking place on board the ships themselves."

Higgins, p. 385.

Article 7, Hague X, 1907, substantially appears as Art. 109 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

HOSPITAL SHIPS AND SICK WARDS NOT ENTITLED TO PROTECTION IF EMPLOYED TO INJURE ENEMY—STAFFS MAY BE ARMED TO MAINTAIN ORDER AND PROTECT PATIENTS, AND SHIPS MAY BE EQUIPPED WITH WIRELESS TELEGRAPHY APPARATUS.

Hospital ships and sick wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.

The fact of the staff of the said ships and sick wards being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection.—*Article 8, Hague X, 1907.*

"Article 8 is new.

"The principle laid down in the first paragraph is borrowed from Article 7 of the Convention of 1906, and is self-evident.

"The second paragraph is drawn from Article 8 of the Convention of 1906, but it has not seemed necessary to reproduce all the provisions of that Article. The staffs of the hospital ships and the sick-wards of men-of-war may be armed, either for maintaining order on board or for protecting the sick and wounded. This fact is not a sufficient reason for withdrawing protection, as long as the arms are used only for the purposes indicated. For a similar reason, the commissioner put on board a hospital ship by a belligerent in conformity with section 5 of Article 4 should not be made prisoner of war if he falls into the power of a cruiser of the country to which the hospital ship belongs upon which he is found. His presence is explained, like that of the picket guarding sick quarters, by the necessity of permitting a ship to fulfill its charitable mission; this justifies the exemption from captivity in both cases.

"The German delegation had provided for the case in which 'the hospital ship is armed with pieces of light ordnance to guard against the dangers of navigation, and more particularly as a protection against any act of piracy.' A discussion took place in the Drafting Committee in regard to the ordnance which a hospital ship might carry, and the opinion which finally prevailed was that arming the ship is by no means necessary. Merchant ships are not armed and do not run greater risks. Of course it would be permissible to have a cannon on board for the purpose of signaling.

"The delegation of the Netherlands had proposed to offer explanations on the subject of wireless telegraphy apparatus on board. After discussion, the majority of the Commission felt that the presence of such an outfit was not in itself a sufficient ground for withdrawing protection. A hospital ship may have to communicate with its own squadron or with land in order to carry out its mission. It is not every use of radiotelegraphic apparatus but only certain uses which may be considered illicit, and it is well to recall here

Article 4, paragraph 2, by which the Governments undertake not to use hospital ships for any military purpose. The execution of such a provision, like many others, depends upon the good faith of the belligerents. Moreover, the provisions of Article 4 will allow commanders of men-of-war to take the measures necessary to prevent abuses; a commissioner can supervise the use of the wireless; in case of need the transmitting apparatus may be temporarily removed."

Reports to the Hague Conferences, pp. 718, 719.

"ART. 7. The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy."

Geneva Convention, 1906.

"ART. 8. A sanitary formation or establishment shall not be deprived of the protection accorded by article 6 by the fact:

1. That the personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

2. That in the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels acting under competent orders.

3. That arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment."

Geneva Convention, 1906.

"ARTICLE 44. Hospital-ships and sick-wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy. The fact that the staff of the said ships and sick-wards is armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection."

Institute (1913), p. 185.

"If the humane work provided for by the Convention is to go on, it is highly desirable that naval commanders should construe strictly the rule of no participation, direct or indirect, in hostilities. The temptation to use a hospital ship as a scout or a despatch boat must be very strong, but it should be firmly resisted. The Russian hospital ship *Orel*, called in the Japanese official documents the *Aryol*, was captured during the battle of Tsushima and confiscated as prize of war because she had carried an order from Admiral Roshestvenski to one of his vessels during the outward voyage of the Baltic Fleet, and had been used less than a week before the battle as a place of reception for the master and some of the crew of the British steamer *Oldhamia*, which had been captured by the Russian cruiser *Oleg*."

Lawrence, p. 411.

A case occurred during the Russo-Japanese War of the use of a hospital ship in the furtherance of belligerent ends. "The Japanese seized, and secured the condemnation of, the Russian hospital ship *Orel* on 27 May, 1905, because she had been used a short time previously for the accommodation of able-bodied prisoners taken from a captured merchantman, and had otherwise assisted in the hostile operations of the Russians."

Higgins, p. 385.

"The second paragraph of Article 8 is based on Article 8 of the Geneva Convention of 1906, but it was not thought necessary to reproduce its provisions in detail. The fact that the staff of the hospital ship or sick-bay are armed for maintaining order or defending sick or wounded, and the presence of wireless telegraphic apparatus on board are not sufficient reasons for withdrawing the protection accorded to such ships or sick-bays. The German draft proposed to allow hospital ships to carry light pieces of artillery as a protection against the dangers of navigation and particularly of piracy, but the Committee considered that there was no necessity for the arming of such ships, especially as merchant-ships which run no greater risks are unarmed. The paragraph regarding the presence of wireless telegraphic apparatus on board was inserted on the proposition of the Dutch delegate. The apparatus may often be of great value in enabling hospital ships to communicate either with ships of their own squadron or with land. Any abuse of it can easily be prevented by agents being placed on board, and, if necessary, the apparatus may be removed temporarily under the general powers of control conferred on belligerent commanders by Article 4."

Higgins, p. 386.

Article 8, Hague X, 1907, substantially appears as Art. 110 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The Japanese Prize Court at Sasebo, in the case of the *Orel* (Vol. 2, Russ.-Jap. P. C., p. 354), held that:

"A hospital ship is only exempt from capture if she fulfills certain conditions and is engaged solely in the humane work of aiding the sick and wounded. That she is liable to capture, should she be used by the enemy for military purposes, is admitted by International Law, and is clearly laid down by the stipulations of the Hague Convention No. 3 of July 29th, 1899, for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22nd, 1864. Although the *Orel* had been lawfully equipped and due notification concerning her had been given by the Russian Government to the Japanese Government, yet her action in communicating the orders of the Commander-in-chief of the Russian Second Pacific Squadron to other vessels during her eastward voyage with the squadron, and her attempt to carry prisoners in good health, i. e., the master and three other members of the crew of a British steamship captured by the Russian fleet, to Vladivostock, which is a naval port in enemy territory, were evidently acts in aid of the military operations of the enemy. Further, when the facts that she was instructed by the Russian squadron to purchase munitions of war, and that she occupied the position usually assigned to a ship engaged in reconnoissance, are taken in consideration, it is reasonable to assume that she was constantly employed for military purposes on behalf of the Russian squadron. She is therefore not entitled to the exemptions laid down in the Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention, and may be condemned according to International Law."

The court in this case also condemned as good prize the money on board this vessel that "was to have been expended in paying the salaries of the Red Cross officials and defraying the expenses of the ship."

The religious, medical, and hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the commander-in-chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.—*Article 10, Hague X, 1907.*

"Article 10 reproduces Article 7 of the Convention of 1899, with one unimportant modification intended to harmonize the provisions relating to land and naval war as regards the pay of the members of the hospital staff temporarily detained by the enemy.[1] It is needless to add that, in naval as well as in land warfare, the official personnel only is concerned, the personnel of a relief society not being entitled to receive pay."

Reports to the Hague Conferences, pp. 719, 720.

"ART. 7. Every person employed in the religious, medical or hospital service of any captured vessel is declared inviolable (*neutre*). On leaving the vessel, he carries away the articles and instruments of surgery which are his own private property."

Geneva Convention, 1868.

"ART. 8. The persons designated in the preceding Article ought to continue to fulfill their functions on board the captured vessel, to assist in the evacuations of the wounded made by the victorious side, after which they should be free to return to their own country, in accordance with the second paragraph of the first additional Article above mentioned.

"The stipulations of the second additional Article above mentioned are applicable to the pay of these persons."

Geneva Convention, 1868.

"ART. 13. While they remain in his power, the enemy will secure to the personnel mentioned in article 9 the same pay and allowances to which persons of the same grade in his own army are entitled."

Geneva Convention, 1906.

[1] Cf. Article 13 of the Convention of 1906.

"ARTICLE 64. C. *Religious, medical, and hospital personnel.*—The religious, medical, and hospital staff of every vessel taken or seized is inviolable, and its members may not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

"This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the commander-in-chief considers it possible.

"The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

"The commissioner put by the belligerent on board the hospital ship of his adversary, in conformity with paragraph 10 of Article 41, enjoys the same protection as the medical staff.

"The religious, medical, and hospital staffs lose their rights of inviolability, if they take part in hostilities, if, for example, they use their arms otherwise than for defense."

Institute (1913), p. 190.

"Article 10 which deals with the inviolability of the hospital staff is a reproduction of Article 7 of the Convention of 1899 with a slight modification introduced from Article 13 of the Geneva Convention of 1906 as regards the payments to be made to members of the hospital staff temporarily detained by the enemy. 'Only the official staff is concerned, that of a relief society having no claim to receive a salary' (Report of M. Renault)."

Higgins, p. 387.

"ART. 26. The religious, medical, and hospital personnel of any vessel captured during hostilities shall be inviolable and not subject to be made prisoners of war. They shall be permitted, upon leaving the ship, to carry with them those articles and instruments of surgery which are their private property.

"Such personnel shall continue to exercise their functions as long as may be necessary, whereupon they may withdraw when the commander in chief deems it possible to do so.

"The belligerents shall insure to such personnel, when falling into their hands, the free exercise of their functions, the receipt of salaries, and entire freedom of movement, unless a military necessity prevents."

United States Naval Code, 1900.

Article 10, Hague X, 1907, substantially appears as Art. 112 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

SICK AND WOUNDED SAILORS, SOLDIERS, AND OTHERS OFFICIALLY ATTACHED TO CAPTURED SHIPS TO BE RESPECTED AND CARED FOR.

Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.—*Article 11, Hague X, 1907.*

"Article 11 corresponds to Article 8 of the Convention of 1899, which it completes to harmonize with Article 1, paragraph 1, of the Geneva Convention."

Reports to the Hague Conferences, p. 720.

"ARTICLE 1. Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are. * * *"

Geneva Convention, 1906.

"ART. 27. Sailors and soldiers, embarked when sick or wounded, shall be protected and cared for by the captors, no matter to what nation they may belong."

United States Naval Code, 1900.

Article 11, Hague X, 1907, substantially appears as Art. 113 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

DEMAND OF BELLIGERENT WAR-SHIP FOR DELIVERY OF SICK AND WOUNDED CARED FOR ON HOSPITAL YACHTS OR PRIVATE VESSELS.

Any war-ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.—*Article 12, Hague X, 1907.*

In respect to this article Great Britain made the following declaration: "In affixing their signatures to the above Convention, the British plenipotentiaries declare that His Majesty's Government understand Article 12 to apply only to the case of combatants rescued during or after a naval engagement in which they have taken part."

"Article 12 is new: it corresponds to an amendment presented by the German delegation,[1] but makes the provision general. We do not think that the rule is new; if the formula is not written into the Convention of 1899, the spirit of that Convention is clear. It is an important point upon which there should be no uncertainty.

"When a belligerent cruiser meets with a military hospital boat, a hospital ship, or a merchant ship, it has the right, either by virtue of Article 4 of the Convention or by virtue of the common law of nations, to visit them whatever their nationality. If it finds shipwrecked, wounded, or sick men on board it has the right to have them delivered up to it, because they are its prisoners, as stated in Article 9 of the Convention of 1899, which is reproduced in Article 14 of our draft. We have here but the application of a general principle, by virtue of which the combatants of a belligerent who fall into the hands of the adversary thereby become its prisoners. Obviously, it will not always be to the interest of the belligerent to make use of this right. Often it will be to his advantage to leave the wounded or sick where they are and not to take charge of them. But, in some cases, it will be indispensable not to allow wounded or sick to go free who are still in condition to render great services to their country; this is easily seen in regard to shipwrecked men who are in good health. It has been said that it would be inhuman to compel a neutral vessel to hand over the wounded whom it had charitably picked up. To overcome this objection, it is only necessary to consider what would be the situation were there no Convention. The positive law of nations would permit not only the capture of the combatants found on board a neutral vessel, but even the seizure and confiscation of the vessel as having rendered *unneutral* service. Moreover, if shipwrecked men, for example, were permitted to escape

[1] See the third paragraph under Article 6, ante.

captivity by the mere fact of their having been taken on board a neutral vessel, the belligerents would disregard the philanthropic action of the neutrals the moment such action might result in causing them irreparable injury. Humanity would not gain by this.

"It is well to add that Article 12 of the draft shows by limitation what a belligerent cruiser may do in regard to neutral merchantmen; it can not divert them from their course or compel them to proceed on a certain route. Article 4 of the Convention of 1899, preserved by this draft, gives such a right only as against vessels specially devoted to hospital service, which must bear the consequences attendant upon the particular role assigned them. Nothing of the kind could be imposed upon such merchant vessels as may occasionally be willing to aid in a charitable work. There can be no argument against Article 9 of the 1899 Convention, which we propose to retain as Article 14, because this Article does not relate to vessels, but only treats of the sick and wounded."

Reports to the Hague Conferences, p. 720.

"ART. 13. * * * The wounded and shipwrecked picked up by these vessels [hospital-ships, equipped at the expense of associations for the aid of the wounded recognized by the Governments which have signed this Convention] cannot be claimed by any of the combatants, but they are under an obligation not to serve again during the continuance of the war."

Geneva Convention, 1868.

"ARTICLE 83. Any war-ship belonging to a belligerent may demand that sick, wounded or shipwrecked men on board military hospital-ships, hospital-ships belonging to relief societies or to private individuals, merchant-ships, yachts, or boats, whatever the nationality of these vessels, should be handed over."

Institute (1913), p. 194.

While the Conference experienced no particular difficulty in reaching an agreement that non-public neutral vessels should be immune from capture for picking up sick, wounded, or shipwrecked belligerents, there was great disagreement as to what should subsequently be done with rescued persons. "On the one hand it was argued that by coming under the neutral flag these people were withdrawn from the operations of warfare, and, therefore, ought not to be given up to their enemies as prisoners or restored to their friends to fight again on recovery, but interned on neutral territory till the end of the war. On the other hand, it was declared that the right of search possessed by belligerents carried with it a right to make prisoners of all the sick, wounded, or shipwrecked members of the enemy's fighting services that might be found on board the neutral vessels searched; and the alleged impossibility of restraining officers from seizing an important commander on the other side if they found him on board a neutral vessel was put forward as a reason for allowing what could not in any case be prevented. In the end the latter view prevailed at the Hague Conference of 1907, in spite of the opposition of the British representatives. The Convention on the subject not only declared that a belligerent warship might demand the surrender of any sick, wounded, or shipwrecked combatants found on board military hos-

pital-ships, or hospital-ships belonging to relief societies or private individuals, but also added that it had the same right with regard to private neutral merchantmen, yachts, or other boats that had responded to the call of humanity and cared for the injured or drowning."

Lawrence, p. 413.

Article 12, Hague X of 1907, is supplementary to Article 14 of that Convention, and was "proposed by the German delegation and supported by M. Renault, the French reporter of the draft, as carrying out the principle of the old Article 9." M. Renault's argument "was that in the absence of a convention international law would allow a belligerent not only to seize enemy combatants found on board a neutral vessel, but also to capture and confiscate the vessel as having rendered an unneutral service to the enemy; and that if shipwrecked combatants, for example, escaped captivity by finding refuge on board a neutral vessel, belligerents would fend off the charitable action of neutrals which threatened them with irreparable damage. He also pointed out that belligerents can not force a neutral merchantman to change her route and destination, as they are allowed to do for hospital-ships. Sir Edward Fry [British delegate] at the discussion in the committee placed on record that 'the British government can not acquiesce in the opinion expressed in the report as to the right of a belligerent ship of war to require the surrender of wounded, sick and shipwrecked combatants on board a merchant vessel sailing under a neutral flag. Failing a special convention, his government considers that the recognition of such a right cannot be based on the existing principles of international law.' This reservation was maintained at the full sitting of the Conference in which the form of the convention was voted, as an expression of opinion on the law in the absence of a convention, but the Art. 12 stands without question as a part of the form voted.

"It is however scarcely the less necessary to form a judgment on the question of principle on which a difference of opinion between such authorities was expressed. To do so we must first remember one point on which the principles of neutral duty allow no controversy. If a neutral ship does not surrender to their enemy the combatants in condition to fight again whom she has saved, she must carry them to her own country and they must there be interned. And this must equally be understood of those who may be expected to be again in a condition for fighting when their wounds have been healed. The real question is therefore whether the choice between the surrender and the internment of the persons concerned is to rest with the belligerent or the neutral. In favour of the neutral it may be urged that those who are under his flag at sea are constructively already in his country, and that their surrender can therefore no more be demanded than if they were physically in it. The belligerent may reply that the constructive identification of a ship with its country has not been admitted by the laws of war, as is proved by the right to take contraband goods, and formerly enemy's goods, from under the neutral flag; and that in the treaties stipulating the rule 'free ships, free goods,' it is common to find it laid down that the freedom of the flag covers all persons on board except those in the enemy's military service. To this it must be added that the belligerent

commander cannot fairly be expected to trust the promise of a private shipmaster to carry his passengers to a port where they will be safely interned, especially since the performance of that promise might be defeated by other causes than bad faith. My conclusion is that the reply is sufficient, and that Art. 12 of the draft convention of 1907 requires from a neutral no more than, in its absence, belligerents could insist on with good warrant. But I cannot agree that in the absence of the article a neutral shipmaster who had taken the persons in question on board would render his ship liable to confiscation for rendering unneutral service to the enemy. There would be no ground for presuming that he intended to restore them to the military service of their own side. If he had the correct intention to see to their safe internment, it is not clear what benefit the enemy would derive from internment being substituted for capture, and there would be no room for suggesting the existence of an improper arrangement between him and the enemy."

Westlake, vol. 2, pp. 187–189.

"Article 12 is new, and settles a very important point which the Convention of 1899 had left unsolved. At the First Peace Conference, Captain Mahan, the United States naval delegate, endeavoured to obtain the insertion of Articles to meet the case of men who by any accident connected with a naval engagement were picked up by a neutral vessel. The commander and some of the crew of the Confederate cruiser *Alabama*, after her last fight with the *Kearsarge* off Cherbourg, were picked up by the British yacht *Deerhound*, the captain of which claimed for the rescued seamen the inviolability of the neutral flag, and their surrender was refused. Captain Mahan's proposal was that in such cases the neutral vessel must surrender the rescued persons, if demand should be made by the other belligerent, or in case no demand was made, that they should not be allowed to serve again during the war. The attempt of the United States delegate was unsuccessful and the Convention of 1899 is silent on this point. Under the new Article a belligerent cruiser meeting a hospital ship of any description or a merchant-ship, yacht or boat of any nationality may demand the surrender of the wounded, sick or shipwrecked men on board. * * *

"A strict application of the principles of neutrality would imply, apart from a Convention, that belligerents taken on board neutral ships should not be allowed to take part again in hostilities during the course of the war: but the statement * * * that the mere fact of picking up shipwrecked or wounded men would render a neutral merchant-ship liable to seizure for unneutral service appears incapable of being substantiated as a rule of international law. The question was discussed by the United States and Great Britain in regard to the rescue * * * by the *Deerhound* of the captain and members of the crew of the *Alabama* on the 19th June, 1864. The solution of the difficulty provided by this Article is, however, one which may be justified by practical considerations. Among those on board a hospital or merchant ship may be found the 'brain' of one of the belligerent navies, and 'military necessity' might be appealed to as a justification for his removal. A belligerent would take the risk of complications with the neutral Power. Moreover, the neutral cap-

tain might from unforeseen circumstances be unable to land the sick, wounded or shipwrecked at a neutral port where they would be interned."

Higgins, pp. 387–389.

"20. The [London] Conference had to consider the difficult question of whether and in what circumstances the removal of contraband persons from under a neutral flag by a belligerent man-of-war was sanctioned by the law of nations. According to the rules followed by various continental countries, the removal of such persons can be claimed and enforced as of right. No such general right has hitherto been admitted by this country, although what may be considered to be an exception was recently made in article 12 of the Convention for the Adaptation of the Principles of the Geneva Convention to Maritime War. Under that article, 'any warship belonging to a belligerent may demand the surrender of sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant-ships, yachts, or boats, whatever the nationality of such vessels.' When discussing these provisions, the British delegates at the second Peace Conference made it clear that the right thereby conceded constituted, in their opinion, an innovation in international law and practice, whilst the representatives of other Powers, notably France, maintained that the principle involved formed part of the existing law. The same divergence of view arose on the present occasion."

Report, March 1, 1909, of the British delegates at the Naval Conference to Sir Edward Grey. British Parliamentary Papers, Misc. No. 4 (1909) (Cd. 4554), p. 97.

Article 12, Hague X, 1907, substantially appears as Art. 114 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

CAPTURED SHIPWRECKED, WOUNDED, OR SICK BELLIGERENTS ARE PRISONERS OF WAR—DISPOSITION OF THEM—IF REPATRIATED, MAY NOT SERVE AGAIN DURING WAR.

The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated can not serve again while the war lasts.—*Article 14, Hague X, 1907.*

"Article 14 simply reproduces Article 9 of the Convention [of 1899]. Certain amendments proposed by the German delegation and the delegation of the Netherlands were withdrawn by reason of the restoration of Article 10 of the Convention.

"The scope of Article 14 has been determined by the considerations expressed above in regard to Article 12; it has to do only with the disposition of individuals, not of vessels, which are provided for elsewhere."

Reports to the Hague Conferences, p. 721.

"ARTICLE 84. The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts."

Institute (1913), p. 194.

"ART. 28. The shipwrecked, wounded, or sick of the enemy, who are captured, are considered prisoners of war. The captor must decide, according to circumstances, whether it is expedient to keep them or send them to a port of his own country, to a neutral port, or even to a port of the enemy. In the last case, the prisoners thus returned to their country can not serve again during the period of the war."

United States Naval Code, 1900.

Article 14, Hague X, 1907, substantially appears as Art. 116 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

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SHIPWRECKED, SICK, AND WOUNDED TO BE LOOKED FOR, AFTER ENGAGEMENT, AND PROTECTED, AS WELL AS THE DEAD, FROM PILLAGE AND ILL TREATMENT—BURIAL OR CREMATION TO BE PRECEDED BY CAREFUL EXAMINATION OF CORPSE.

After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.—*Article 16, Hague X, 1907.*

"Article 16 is new; it is borrowed from the [Geneva] Convention of 1906 (Article 3). It has been thought strange that the words 'burial' and 'cremation' were kept, as, naturally, they will not often be applicable in the case of naval operations. But it must be remembered that an engagement may take place near the coast and that the provision applies to the individuals who may be on land."

Reports to the Hague Conferences, p. 721.

"Art. 3. After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration."

Geneva Convention, 1906.

"Article 85. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, and wounded, and to protect them, as well as the dead, from pillage and ill treatment.

They shall see that the burial, whether by land or sea, or the cremation of the dead shall be preceded by a careful examination of the corpse."

Institute (1913), p. 194.

Article 16, Hague X, 1907, substantially appears as Art. 118 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospitals and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.—*Article 17, Hague X, 1907.*

"Article 17 is new. It corresponds to Article 4 of the [Geneva] Convention of 1906."

Reports to the Hague Conferences, p. 721.

"ART. 4. As soon as possible each belligerent shall forward to the authorities of their country or army the marks or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country."

Geneva Convention, 1906.

"ARTICLE 86. Each belligerent shall send, as early as possible, to the authorities of their country, their navy, or their army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

"The belligerents shall keep each other informed as to internments and transfers as well as to admissions into hospitals and the deaths

which have occurred among the sick and wounded in their hands. They shall collect, in order to have them forwarded to the persons concerned by the authorities of their own country, all the objects of personal use, valuables, letters, etc., which are found in the captured or seized ships, or which have been left by the sick or wounded who died in hospital."

Institute (1913), p. 194.

Article 17, Hague X, 1907, substantially appears as Art. 119 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.—*Article 19, Hague X, 1907.*

"Article 19 is new and corresponds to Article 25 of the Convention of 1906."

Reports to the Hague Conference, p. 721.

ART. 25. It shall be the duty of the commanders in chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this convention.

Geneva Convention, 1906.

Article 19, Hague X, 1907, substantially appears as Art. 120 of the Austro-Hungarian Rules of Maritime and Land Warfare, 1913.

The signatory Powers shall take the necessary measures for bringing the provisions of the present Convention [Hague X, 1907] to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.—*Article 20, Hague X, 1907.*

"Article 20, which is new, and corresponds to Article 26 of the Convention of 1906, we consider very important. The best of rules becomes a dead letter if steps are not taken in advance to bring it to the knowledge of those who will have to apply them. Especially will the personnel on board hospital ships often be called upon to perform some very delicate mission. They must be convinced of the necessity of not taking advantage of the immunities they enjoy in order to commit belligerent acts; this would ruin the Convention and all the humanitarian work of the two Peace Conferences."

Reports to the Hague Conferences, p. 721.

"Art. 26. The signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large."

Geneva Convention, 1906.

This article "is obviously of great importance, and M. Renault emphasizes this in his Report. 'The best of rules become a dead letter if measures are not taken in advance for the instruction of those who will have to apply them. The staff of hospital ships or floating hospitals will often have to fulfil a very difficult mission. They must be convinced of the necessity of not taking advantage of the immunities accorded them to commit acts of belligerency: for, to do so would result in the ruin of the Convention and all the humanitarian work of the two Peace Conferences.'"

Higgins, p. 391.

The signatory Powers likewise undertake to enact or to propose to their legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in Article 5 by vessels not protected by the present Convention.

They will communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention.—*Article 21, Hague X, 1907.*

"Article 21 is new. It corresponds to Articles 27 and 28 of the Convention of 1906, and has given rise to no difficulty."

Reports to the Hague Conferences, p. 722.

"ART. 27. The signatory powers whose legislation may not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private persons or by societies other than those upon which this convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade-marks or commercial labels.

The prohibition of the use of the emblem or name in question shall take effect from the time set in each act of legislation, and at the latest five years after this convention goes into effect. After such going into effect, it shall be unlawful to use a trade-mark or commercial label contrary to such prohibition."

Geneva Convention, 1906.

"ART. 28. In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present convention."

Geneva Convention, 1906.

PROVISIONS OF HAGUE CONVENTION X, 1907, APPLY ONLY TO FORCES AFLOAT.

In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship.—*Article 22, Hague X, 1907.*

"Article 22 is new. It presents no difficulties. In the case of military operations taking place at the same time on land and sea, the new Convention must be applied to the forces afloat, and the Convention of 1906 to the forces operating on land."

Reports to the Hague Conferences, p. 722.

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